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Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~588~~ 9

THE YOUNGSTOWN SHEET & TUBE COMPANY,
APPELLANT,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER
OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED OCTOBER 30, 1957
PROBABLE JURISDICTION NOTED JANUARY 6, 1958.

Supreme Court of the United States

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IN SUPREME COURT OF OHIO

No. 34872

YOUNGSTOWN SHEET AND TUBE COMPANY, Appellee,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellant.

Appeal from the Board of Tax Appeals

EXCERPTS FROM MEMORANDA OF PLEADINGS, ETC. FILED, WRITS ISSUED, ETC., JUDGMENTS, ORDERS AND DECREES

Journal No. 42, page 242.

Appeal from the Board of Tax Appeals:

JOURNAL ENTRY OF JUDGMENT—January 30, 1957

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed for the reasons stated in the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

[fol. 3] Journal No. 42, page 259.

Rehearing Docket:

JOURNAL ENTRY OF ORDER DENYING REHEARING—February 20, 1957

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 4] [File endorsement omitted]

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 34872

YOUNGSTOWN SHEET AND TUBE Co., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 30, 1957

I. Notice is herewith given that Youngstown Sheet and Tube Co., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio reversing the Board of Tax Appeals of Ohio, such final judgment having been entered on January 30, 1957, and from the final judgment of the said Supreme Court of Ohio denying the appellant's application for rehearing entered on February 20, 1957.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in the cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1) A copy of the final determination of the Tax Commissioner.

2) A copy of appellant's notice of appeal from the Tax Commissioner's final determination, as filed with the Board of Tax Appeals.

3) A copy of the opinion of the Board of Tax Appeals of Ohio.

4) A copy of the notice of appeal from the Board of Tax Appeals, as filed with this Court on behalf of the Tax Commissioner.

5) A copy of the opinion of this Court.

6) A copy of the application for rehearing, as filed with this Court on behalf of the appellant.

[fol. 6] 7) A transcript of docket and journal entries of this Court in this cause, on the merits and on application for rehearing.

8) A transcript of all transcripts and evidence certified by the Board of Tax Appeals to this Court.

III. The following questions are presented by this appeal:

1. Do Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, as construed by the Supreme Court of Ohio, violate Article I., Section 10, Clause 2, of the Constitution of the United States, in that iron ores imported by appellant from foreign nations, and remaining in the original form as imported are subjected to Ohio personal property taxes?

2. Do Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, as construed by the Supreme Court of Ohio, violate Article I., Section 10, Clause 2, of the Constitution of the United States, in that iron ores imported by appellant from foreign nations, and remaining in the original form as imported, are subjected to Ohio personal property taxes if any portion of the ore is removed to a further storage point for eventual use by appellant in its processing operations?

3. Do Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, as construed by the Supreme Court of Ohio, violate Article I., Section 10, Clause 2, of the Constitution of the United States, in that iron ores imported by appellant from foreign nations and remaining in the original form as imported, are subjected to Ohio personal property taxes, if placed with prior imports of identical ores from which any portion has been withdrawn to a further storage

point for eventual use by appellant in its processing operations?

/s/ Carlton S. Dargusch, Attorney for Youngstown Sheet and Tube Co., Appellant, 33 North High Street, Columbus 15, Ohio.

[fol. 7] Proof of service (omitted in printing).

[fol. 8] Certificate of service (omitted in printing).

[fol. 10] [File endorsement omitted]

[fol. 11]

IN THE SUPREME COURT OF OHIO

YOUNGSTOWN SHEET AND TUBE CO., Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

CERTIFICATE OF SUPREME COURT OF OHIO AS TO CONSTITUTIONAL QUESTION—Filed May 20, 1957

On motion of appellant, Youngstown Sheet and Tube Co., the Court orders it to be certified and made a part of the record of the proceeding and of the judgment in this cause that the Tax Commissioner, by his appeal to this Court from the Board of Tax Appeals of Ohio, placed in issue the constitutionality of Sections 5711.03, 5701.08, 5709.01, and 5711.01 of the Ohio Revised Code, as to whether appellant's iron ore imports were taxable under those Sections, or protected therefrom by Article I, Section 10, Clause 2 of the United States Constitution as imports; that this Court, pursuant to appeal, and upon the record, briefs of counsel and oral argument, reversed the Board of Tax Appeals of Ohio, which had held that appellant's iron ore imports were protected from the application of the above Sections, and in turn held that the Sections did tax appel-

lant's iron ore imports; that upon consideration of the [fol. 12] same, the Court was of the opinion and accordingly decided, that the said Statutes were not invalid by reason of taxing appellant's iron ore imports and were not repugnant to the United States Constitution in so taxing; and that a determination of that question was appropriate and necessary to a decision in this case.

Witness the Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio

/s/ Carl V. Weygandt, Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 14] BEFORE THE DEPARTMENT OF TAXATION

OPINION AND ORDER OF TAX COMMISSIONER—March 2, 1955

This proceeding being the application of The Youngstown Sheet & Tube Company, an inter-county corporation, Youngstown, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its 1954 inter-county corporation return of taxable property, eliminated from the average value of its manufacturing inventories reported therein, an amount representing [fol. 15] the value of certain inventories of property owned by it and held in various storage facilities in this state for storage only: Upon audit, the average value of such excluded property consisting of, (a) iron ore at Lake Erie docks in Cuyahoga and Ashtabula counties, (b) iron ore, coal, scrap, limestone, fluor spar, ferros, and additions at the applicant's plant in Trumbull and Mahoning counties, and (c) finished seamless pipe at the applicant's plant in Mahoning county, was added back to the average value of manufacturing inventories as reported by the applicant. An increased assessment reflecting such action was issued for the year 1954.

The applicant filed this application for review and redetermination from such increased assessment, contending that the statutes purporting to levy a tax on merchandise held by it in storage facilities for storage only discriminate against it, and are, therefore, unconstitutional and void in that identical property, when held by a nonresident of this state for storage only, is excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Subsequent to the issuance of the increased assessment here in issue and prior to the hearing on this application for review and redetermination, an audit was made of the applicant's books and records. As a result of such audit, certain increases were proposed in the value of applicant's property taxable in Schedules 2 and 3. The applicant's objections to such proposed increases were raised and developed at the hearing, and, in substance, are as follows:

1. To the inclusion in Schedule 2, as a part of taxable construction in progress, of an account captioned "engineering expense" which account the applicant main- [fol. 16] tains, represents fees and expenditures for the preparation and supervision of the preparation of drawings, including plans, specifications and other detail incidental thereto, and their execution, which services applicant claims are exempt from taxation under Section 5701.03, Revised Code, and Goodyear Aircraft Corporation v. Peck, 162 Ohio St., 200.

2. To the inclusion in Schedule 3 of the value of iron ores imported by the applicant from various foreign countries which ores, the applicant maintains, are immune from state taxation under the provisions of Article I, Section 10, Clause 2 of the United States Constitution.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official, he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton

County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E. 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d 162. Thus, the Tax Commissioner finds no error in the assessment here under review since the property assessed is subject to taxation under the existing provisions of Sections 5701.08, 5709.01, 5711.03, 5711.22 and correlated sections of the Revised Code.

Being further advised, the Tax Commissioner finds that the item of "engineering expense" is not exempt from taxation as personal property under the applicable statutes or [fol. 17] the case of Goodyear Aircraft Corp. v. Peck, supra, and is, therefore, subject to taxation as a part of the value of personal property in the process of construction to which it relates.

With respect to the matter of import ores, the Tax Commissioner, being fully advised as to the facts incident to the importation and use thereof, finds that such ores have lost their identity as imports due to the fact that the import units thereof have been broken or mingled with domestic property. Thus, the Tax Commissioner finds that such ores are properly subject to state taxation. Hooven & Allison Company v. Evatt, 324 U. S. 652; 1946 O.A.G. 107.

Giving effect to the findings made herein, the Tax Commissioner finds that the true value of applicant's property taxable in Schedules 2 and 3 for the year 1954 is as follows:

Schedule	True Value
2	$44,733,598.00
3	28,800,157.00

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance with the findings made in this journal entry. Such cer-

tificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

Department of Taxation

/s/ Stanley J. Bowers, Tax Commissioner.

[fol. 23]

BEFORE THE BOARD OF TAX APPEALS, STATE OF OHIO

OPINION AND ORDER—April 30, 1956

This appeal is from a review and redetermination of an increased tangible personal property tax assessment covering the year 1954, made by the Tax Commissioner, against the taxpayer on March 2, 1955.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, a stipulation of facts, the record of a hearing had on August 29 last, exhibits, and briefs of counsel.

Youngstown Sheet, a domestic corporation, in making its 1954 intercounty corporate return of taxable property, eliminated from the average value of its manufacturing inventories reported, certain inventories of property owned by it and held in various storage places in this state for storage only. The Tax Commissioner, in his final order now complained of, found these withheld inventories to be includable. The inclusion of these inventories within the average value of its manufacturing inventories reported, presents two of the three questions now made before this board on review. The third question had to do with the further inclusion of certain "engineering expense" within the tax base, which appellant contends is exempt from taxation.

We shall delay any further recitation of facts, and make note thereof in our consideration of the three respective errors complained of. The property of the taxpayer, withheld by it from the average value of its manufacturing inventories, and incorporated therein by the Tax Commissioner exclusive of "engineering expense", consists of iron ore at Lake Erie docks, iron ore, coal, scrap, limestone, [fol. 24] fluor spar stored at company plants in Trumbull

and Mahoning counties, held exclusively for future use, and finished seamless pipe held at its Mahoning plant for subsequent sale. Appellant says of this property, that:

> "Appellee erred in including, as taxable merchandise belonging to appellant and held for storage only in this state for the reason that like property belonging to a nonresident is excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on merchandise belonging to residents of this state and held for storage only, is, therefore unconstitutional and void in that it denies appellant the equal protection of the laws to which appellant is entitled under the Constitution of the State of Ohio and the Constitution of the United States."

Appellee, upon review, considered that this, being the property of a domestic corporation, was, under the statute, includable within the tax base, and since the question made was a constitutional one, and that he, as an administrative officer, was not empowered to consider the question of the constitutionality of a statute, and was bound to administer the statutory law as he found it. He had no other course but to do as he did, that is, include this property within appellant's average inventory base. The Board of Tax Appeals is likewise not invested with power to consider questions as to the constitutionality of a statute. Hence, it must follow that this board can do nothing more than affirm the Tax Commissioner on this phase of his order in the respect complained of, which is accordingly done. If appellant has been unjustly discriminated against, that is a matter solely for a court of competent jurisdiction to determine.

[fol. 25] Appellant in its brief in chief assumes that this board lacks jurisdiction to consider its question of inclusion of imports in its average taxable inventory because it presents a constitutional question. The Board of Tax Appeals does not subscribe to this view. True, the answer to this question is to be found in the federal Constitution and adjudications of the federal courts; but, as we see it, the

board is not required to declare a state statute in conflict therewith and therefore unconstitutional. We do not believe that any pertinent state statute conflicts with Article I, Section 10, Clause 2 of the federal Constitution. Appellee briefs this issue in its answer brief.

Revised Code Section 5709.01 provides in part, that

> "All personal property located and used in business in this state, * * *, are subject to taxation, * * *."

Revised Code Section 5711.01 reads in part, that

> "(A) 'Taxable property' includes all the kinds of property, * * *, mentioned in sections 5709.01 and 5709.02 of the Revised Code, * * *."

Revised Code Section 5711.03, which provides for the listing of taxable property, contains this provision:

> "Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts * * *."

These Code provisions appear to be the only sections thereof that could possibly be in conflict with the federal constitutional provision. We make the following observations. The General Assemblies of Ohio were unquestionably familiar with the constitutional provision. They legislated with that thought in mind. Note that Revised Code Section 5709.01 reads, "all personal property *located and* [fol. 26] *used in business* in this state". Is this imported property located in Ohio? Had it on tax listing date become a part of the general mass of personal property in this state? These two questions must be answered in the negative unless the facts disclose that these ores were not then in the hands of the importer or had ceased to retain their import character. The federal laws and cases relating to interstate commerce, and particularly those provisions relating to taxation of goods in transit, closely parallel the rules of taxation governing imports. No one can successfully maintain that goods in transit in interstate commerce, or temporarily delayed within a state, may be

locally taxed. Yet such goods are then at least temporarily located within a state. Clearly the words used in Revised Code Section 5709.01 were intended to embrace only goods that had permanently found location in Ohio, and that had become a part of the general mass of property in the state, and devoted to business therein.

As said in Orphans' Asylum v. Board of Tax Appeals, 150 O. S. 219, it is this board's mandatory duty to see to it that no taxable property escape taxation, and that no property entitled to exemption from taxation be unlawfully taxed. True that was said in a real property exemption matter, however, the same is equally true of personal property. The court held that this board had jurisdiction therein and should have exempted the property under the provisions of a prior statutory contract and Trustees of Dartmouth College v. Woodward, 17 U. S. 518, 4 L. Ed. 629.

Any number of cases involving imports have been considered by both state and federal courts. The law as expounded by the federal courts is fairly well established. [fol. 27] We shall seek to follow the interpretation by federal courts as it pertains to taxation of imports.

The second question presented by appellant has to do with a portion of appellant's property held in storage. This property consists of imported ores. During the year covered by its 1954 tax return it held the following average monthly imported ore inventory during 1953:

Grade	Imported From	Average Inventory Value
(1) Brazilian Ore	Brazil	$ 503,161.39
(2) Cuban Ore	Cuba	34,571.46
(3) Mexican Ore	Mexico	58,345.68
(4) Liberian Ore	Liberia	5,367.52
(5) Seine River Ore	Canada	791,786.82
	Total	$1,393,232.87

Appellant purchased and imported these 5 grades of ore, the first 4 grades for use in its open hearth furnaces, the fifth grade for use in its blast furnaces. This ore was not

purchased for resale. It was loaded in bulk in foreign ports into chartered vessels which carried but a single cargo and a single grade of ore. When the vessels reached a port of entry the ore was discharged from the vessel into railroad cars and transported in bulk by rail from port of entry to Youngstown, Ohio. Upon arrival in Youngstown the railroad cars were spotted at one or more of appellant's storage yards and there unloaded into separate storage piles and held for subsequent use as needed. A separate storage pile is maintained for each grade of imported ore and such ore is not commingled or mixed with other property of the taxpayer. These stock piles of separate grades of ores are located some distance from stock bins and furnaces. When the need arises for ore of a particular grade [fol. 28] it is taken from the particular grade stock pile, transported to and placed in the stock bins. When a subsequent shipment of bulk ore of the same grade is received it is placed in that grade's stock pile; that is, all imports of Brazilian ore were placed in the Brazilian stock pile, Cuban ore in the Cuban stock pile, Mexican ore in the Mexican stock pile, Liberian ore in the Liberian stock pile, and Seine River ore in the Seine River stock pile. Hence, a stock pile of a particular grade may be diminished by a day's need and augmented the next by subsequently imported ore of the same grade. At all stages these ores are loaded, imported, reloaded into railroad cars and unloaded into grade stock piles and then reloaded and taken to stock bins as needed in bulk. It sought at all times to have a three months' supply of all grades of imported ore on hand.

At this point we wish it to be distinctly understood that this issue is presented on an agreed stipulation of facts. It will be decided strictly upon those facts. Such facts as are hereinbefore stated are taken directly from the agreed stipulated facts.

The taxpayer concedes that these imported ores lose their immunity from state taxation when they are removed from storage piles and placed in the stock bins, but insists that so long as these ores remain in their separate stock piles the state may not tax these imports. Appellant grounds its claim on Article I, Section 10, Clause 2 of the Constitution of the United States and various causes de-

cided thereunder. The constitutional provision provides as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

[fol. 29] The question made calls for determination of two issues of fact. First, was the appellant the importer of these bulk iron ores? Second, whether or not these bulk ores, when received in Youngstown and placed in stock piles of the particular grade set apart for each respective grade and not mixed with other ores of different grades, and ores were taken therefrom as needed, and like grade of ore was subsequently added thereto, lost their distinctive character as imports, and have become subject to the taxing power of the state of Ohio. If the first query be answered in the negative, the second query becomes immaterial.

The facts of this case, as to how and in what manner, this ore was purchased, delivery made and payment effected, hardly need further comment other than to say that they are in substance parallel with those found in Hooven & Allison Co. v. Evatt, 142 O. S. 235, which was reversed by the United States Supreme Court. See 324 U. S. 652, 89 L. Ed. 1252. The dissenting opinion of Judge Bell in the state report, and the opinion of Chief Justice Stone in the federal report, set forth at length the conclusion of fact and law applicable thereto more succinctly, perhaps, than this board could do. Appellant, from the contracts of purchase of these ores in evidence, clearly appears to have procured the importation of these ores, and even though channeled through brokerage firms, it accepted title to these ores when loaded on board ship at the foreign port of shipment. Appellant then made payment of the major portion of the purchase price. It caused and paid import duties and charges, marine insurance covering these cargoes and other transportation charges. The brokerage firms simply acted as agents and facilitating mediums through which these contracts of purchase and sale were [fol. 30] effected. The buyer at all times appears to have been Youngstown Sheet and Tube. Upon the facts present

we do not consider that it can be successfully maintained that appellant was not the importer of these ores.

The second query presents a far more difficult question, and one which may, on completion of the Seaway Canal to the Great Lakes and importation of Labrador ore, be of vital interest to Ohio's courts and industry. Had these ores lost, by the manner of their handling, their import character? If we were here dealing with, let us say, sugar imported in bags, in cargo lots and stock piled in warehouse, the solution of the question would be simplified. Carrying the illustration further, if 5,000 bags of sugar were contained in one shipment and stored for subsequent use or sale in warehouse, and the next day 500 bags were removed therefrom for use or sale, and the day following a second cargo of 5,000 bags of like kind and quality was received and added to the stock pile, there would unquestionably remain in the original containers in the stock pile 9500 bags of imported sugar. In the present case we are dealing with an imported commodity that economically, commercially and practically, cannot be packaged, but must be purchased in bulk in boat cargo or railroad car lots. Unlike sugar, its bulk and indestructibility from weather economically requires and permits its storage in open air stock piles. If we adopt the figures above used in the sugar illustration and denominate the bags as tons, we have 9500 tons of iron ore of a particular grade and kind remaining in the particular stock pile.

The exceptional men who produced the constitution, and the particular provision drawn in question could readily visualize, or had already experienced, that certain com- [fol. 31] modities would be imported in bulk which were not susceptibible (sic) of packaging. Hence, they generally provided that no state should lay imposts or duties on imports until that property had lost its import character. They did not limit the provision's applicability to packaged imports. They knew that metals were extracted from bulky ores and that such would probably be imported. Since that period numerous other products, such as petroleum, oils, gasoline, bananas, lumber, guano, phosphate, limestone, and other commodities are now imported in bulk lots, due to a like inability to economically package them.

The earliest and still the leading case, on interpretation of the constitutional section in issue, is that of Brown v. Maryland, 25 U. S. 419, 6 L. Ed. 678, in which Chief Justice Marshall says:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In a later case, said to be the leading "original package" case, Low v. Austin, 80 U. S. (13 Wall.), 29, 20 L. Ed. 517, Justice Field makes these two observations:

> "Indeed goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.
>
> [fol. 32] "Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State."

From report of what are known as the "License Cases", Thurlow v. Mass., Fletcher v. R. I., Peirce v. N. H., 46 U. S. 504 (see 575), 12 L. Ed. 256, we learn that Chief Justice Taney argued for the state in Brown v. Maryland, supra, and that he thereafter sustained a change of mind. He therein concludes:

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense

be regarded as part of the mass of property in the State usually taxed for the support of the State Government."

Examination of numerous cases discloses that since decision of Brown v. Maryland, supra, and the "License Cases", there has been developed what is termed the "original package" theory. In Washington Chocolate v. King County, 21 Wash. (2d) 630, is found a well considered case in which many authorities are reviewed. Imports in this case were packaged articles. Its second syllabus succinctly sets up three situations developed by that theory:

"Imported merchandise loses its constitutional immunity from state taxation,

"(1) When it is no longer in the original package;

"(2) When the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and

"(3) When it has been sold by the original importer to a purchaser, even though it remains in the original package."

We can find no fault with these conclusions. The question, however, which troubles us is: Whether or not im- [fol. 33] ports in bulk, not susceptible of packaging, which constitute the entire cargo of the ship transporting the commodity to the port of entry, become subject to state taxation when unloaded from the ship. In answering this query, we have confined ourselves particularly to the only available reported decisions findable that had such bulk question squarely before them.

In Mexican Pet. Corp. v. City of S. Portland, 121 Me. 128, 115 Atl. 900, 26 A. L. R. 965, we find a case of bulk importation of oil decided upon the "original package" theory. Its syllabus holds:

"Oil imported in tank steamers and pumped into receiving tanks belonging to the importer, for distribution by the owner of the tanks, has lost its char-

acter as an import and becomes subject to local taxation."

If this be a correct solution of that case, then by the same reasoning, the act of unloading any like bulk import is a severance of the import from the original package, which is the ship, and the import becomes a part of the general mass of property and loses its constitutional immunity the instant it is unloaded and enters the country. This is not true, however, under the original package theory if the commodity imported is packaged in containers. It does, therefore, appear, under the reasoning of the Maine case, that packaged imports are favored and have a preference over goods imported in bulk. We do not think that the constitutional inhibition made any such distinction. The court, in its next to the last paragraph of the Maine case, notes that at least two justices of the Supreme Court of New Jersey, in a nonreported case, under identical facts, are opposed to the Maine court's judgment.

[fol. 34] Reverting to the case of Brown v. Maryland, supra, it must be noted that Chief Justice Marshall refrained from defining the term "original package", and went on to hold that goods "while remaining the property of the importer, in his warehouse, *in the original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." It is also again noted that Chief Justice Taney in "License Cases", supra, drops out the word "package" and employs only the term "*the form and shape*" in which they, the goods, are brought into the country. Justice Field, in the leading "original package" case, Low v. Austin, supra, adopts Taney's exact wording.

Four more recent authorities which have to do with importation of bulk ship cargo imports strongly commend themselves to us. All four causes note the Maine case, supra, and disagree with its conclusion. In, re Taxes Pacific Guano & Fertilizer Co., 32 Hawaii, 431 (441), the Supreme Court of the Territory says and holds:

"The phosphate rock was brought in ships in bulk. It could not have been stored in original packages, for

it did not come in any package whatever. It would be an undue stretch of language to say that the ships were the original package. The test as to 'original packages' does not apply in such cases. The phosphate rock, within the decision in the Maryland case, was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk, it was being kept in the warehouse in bins separate from the general mass of property in this Territory."

The second case is that of Galveston v. Mexican Pet. Corp., 15 Fed. (2d) 208. The court's opinion states that

[fol. 35] "Oil brought from Mexico, not for general and indiscriminate sale, but to fill contract already made, retains its character as import, not subject to local taxation, though some small quantities were sold locally, when pumped into tanks from steamers from which it was shipped."

The third case is that of Philippine Refining Corp. of N. Y. v. County of Contra Costa, 24 Cal. App. (2d) 665, its syllabus reads:

"Where an importer of coconut oil from the Philippine Island, having a place of business in another state, conducts such business by aggregating orders sufficient to fill a tank or tanks in a steamer and, upon arrival of the oil at the point of transshipment in this state, it is placed in temporary storage facilities, from which it is then taken and delivered, in the form in which it arrives, but in agreed quantities, to the buyers throughout the United States, pursuant to the orders theretofore made, and none of the oil in such storage facilities is held for indiscriminate sale, or for any purpose other than solely incidental to its transportation to the prior purchasers, said oil is not subject to local taxation, and local taxes paid thereon under protest may be recovered as being in violation of article I, sections 8 and 10, of the federal Constitution."

The fourth case is that of Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604 (see 614), 138 So.

117. This case deals with Mexican crude oil imported in tankers. When it reached the port of entry, it was heated to make more ductile and pumped into land storage tanks. Of the state's right to tax this import, the court says and holds:

> "It is obvious, under the authorities cited, and especially under Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095, that, because the [fol. 36] oil came to a state of rest at Destrehan to be there refined, it did not lose its character as an import. A more important question concerns the manner of importation. Our appreciation of Brown v. Maryland, and the authorities cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general commerce, whether for heating purposes, or for the manufacture of important articles of gasoline, kerosene, asphalt, or other products. It is obvious that to deprive such importations of their immunities as imports would be a blow to the great oil industry, and, as a result, to the people thereof. The import clause of the Constitution was not so intended or designed."

Another case of interest is that of Southern Pacific Co. v. City of Calexico, 288 Fed. 624 (642). Although it has to do with importation of baled Mexican cotton, which had to be recompressed before shipment to England, the court states that in such cases:

> "The controlling question is: Was the property kept segregated from the general mass of property in the

state in such a way that it could always be identified, and not subject to any beneficial use?" (Such as hypothecation, which the court had in mind.)

We think it well to make some comment on the case of Sonneborn v. Cureton, supra. This was an original pack- [fol. 37] age interstate commerce case, and not one of foreign bulk importation. It is here important for two reasons. Chief Justice Taft therein succinctly sets forth the reasons that lie behind the difference in the rule applicable in interstate commerce transactions from that of foreign importations, as they apply to goods in their original package. At page 1098 of the Law Ed. report appears the following further pronouncement:

> "It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it."

The questions presented by appellant's second claim of error, that is, the matter of the taxability of bulk importations, have been previously inquired into by the old Tax Commission and the Tax Commissioner of Ohio. In fact, the attorney general has twice been called upon for his opinion in such instances. See Attorney General's Opinions of 1928, Vol. 1, page 141, and of 1946, page 107. In the 1928 opinion the attorney general considered that flaxseed imported in bulk, for use by the importer in the manufacture of finished products, elevated from a ship's hold into large bins, from which the importer from time to time took sufficient flaxseed to supply its present needs as production required, lost its distinctive character as an import (the residue in bins) by reason of such withdrawals. In the second opinion a succeeding attorney general modifies his predecessor's views. We quote from the second opinion inasmuch as it raises the point here in issue which we think to be a vital point in this controversy.

> "The importer should enjoy tax immunity for his imported goods so long as he retains them as undis-

[fol. 38] turbed units. In Hooven & Allison Company v. Evatt, 324 U. S. 652, 89 L. Ed. Advance Opinions, 852, Mr. Chief Justice Stone in his opinion said:

"'Plainly if and when removed from the package in which they are imported, or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.

"'If the imports be packaged goods, the package is the unit which must remain unbroken and used. If they be unpackaged, then the rule should remain the same with respect to each unit. In the case of fungible goods shipped in bulk, the better rule would seem to be that we regard the entire quantity of each person's importation or any separated unit thereof as the unit that must not be divided, mingled or otherwise used if tax immunity is to be retained. The vital factor seems not to be the breaking of a package, but the breaking up of an imported unit, the mingling of the whole or any part thereof with domestic property, or the use of the whole or any part of a unit. Hooven & Allison Company v. Evatt, supra.

"'If this test be applied to the 1928 Attorney General's Opinion, the conclusion reached therein is sustained, for the form of the import is changed by using parts of the imported units from time to time in manufacturing.'"

As we read the excerpt taken from the Hooven & Allison case, we remember that the court therein was considering packaged goods, and of course if a package was opened and a part of its contents was used for the purpose for which it was imported, the balance of the goods in that package lost its identity as an import; but we do not understand that Chief Justice Stone was saying that all other units or all other originally packaged goods in the import thereby lost their import identity. This manner of reasoning would lead to the inconsistent conclusion that if one [fol. 39] bag of sugar in an import of 500 bags is sold or consumed, that the remaining 499 bags thereby become subject to state taxation because the unit import has been destroyed. To our notion this is a complete departure from

the original package theory, and attempts to create a new yardstick in its stead, that of "breaking up of an imported unit". Certainly, it disregards the rule of Brown v. Maryland which still appears to be the law of the land. The bulk importer would have but one recourse. He must sell or consume his entire ship's cargo in a single transaction or one operation. This newly conceived theory has one advantage. It would permit state taxation of that which the constitutional provision prescribes shall not be taxed. It further strikes us that if the Maine case, supra, is rightly decided, it effects the very practice which induced adoption of the constitutional provision, and that which it sought to prohibit, to wit, the taxing of an import by the state having the port of entry within its border of imports destined for use and consumption in an interior state. This practice was then a very live issue. See Federalist Papers and Madison's Notes.

The rule, as we understand it, is that as found in the second, eighth and tenth syllabi of Hooven & Allison Co. v. Evatt, supra:

> 2. "The prohibition in Article I, Sect. 10, Cl. 2, of the Federal Constitution of state imposts or duties on imports necessarily extended to state taxation of things imported after their arrival, so long as they retain the character of imports and have not become a part of the common mass of property within the state.
>
> 8. "A manufacturer's stock pile of imported materials, stored in the original packages in a warehouse at [fol. 40] the factory pending use in the manufacturing process, retains the character of imports entitled to constitutional immunity from state taxation.
>
> 10. "Imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, or when the original packages in which they were imported are broken."

We find no authority, dealing with importations in bulk, that approves of the Maine court's reasoning and conclu-

sion save and except that of Tres Ritos Ranch Co. v. Abbott, 44 N. M. 556, 105 P. (2d) 1070, 130 A. L. R. 963, which is readily distinguishable upon the determining factors that the imported cattle were no longer in the same form and had been commingled with the general mass of property in the state. The court also found as a matter of fact that the Ranch Company was not the importer, which could easily have been dispositive of the appeal. Although the Maine court grounds its conclusion on the opinions of Marshall, Taney and Field, it rests squarely upon the hypothesis that there is but a single test in all cases, that being the "original package" theory. It entirely disregards that portion of those opinions which speak of *"the original form or package"*. The Supreme Court of the United States has not as yet held that the "original package" theory is the one and only test whether the import be packaged or *in bulk*. We feel that the Maine court, in its zeal to see that no property of a taxable class within its borders shall escape state taxation, adopts the only theory upon which the questioned property could be locally assessed.

[fol. 41] It was never intended that packaged imports should have a preference over bulk imports, and that the latter, because of their weights and quantities, were not within the constitutional prohibition. It is fairly obvious that it would be rather absurd to require an importer of goods to stockpile each identical merchandise importation separately. If he received a hundred identical shipments must he then have a hundred separated places of storage for the same identical article? We think not. Because perishable goods require inside storage, it does not follow that bulky nonperishable imports must be stored inside or under cover. To do so in many instances would entail prohibitive expenditures. If one may remove 500 bags of stored imported sugar from a storage warehouse, it would not follow that the 4500 bags left in storage of a 5,000 bag importation would destroy the import character of the 4,500 identical bags left remaining in storage. Neither do we see how the remaining stored imported sugar's import character would be destroyed by augmenting the stock pile by a second importation of identical sugar. What is true of sugar is equally true of imported ore in bulk. There is

no mixing of grades, kinds or quality. Its import identity is undisturbed. The quantity always present in the stock pile is as susceptible of mathematical computation on a per ton basis as are the number of bags of sugar in the stock pile.

Appellee, in the course of his answer brief, refers to two cases, one of which is F. May & Co. v. City of New Orleans, 178 U. S. 496, 44 L. Ed. 1165. This case is one dealing with whether or not the box or contained (sic) in which the foreign producer packaged the imports, or the individually packaged articles contained within the box or container, [fol. 42] were the "original package" and when broken the separately packaged imports contained therein lost their import character.

The second case advanced is that of E. J. Stanton & Sons v. County of Los Angeles, 78 Cal. App. (2) 181, 177 Pac. (2) 804. This we have carefully examined as well as the same court's earlier case of Dant & Russell, Inc. v. Bd. of Sup'rs. of Los Angeles Co., 128 P. 2d, 389. It is difficult to harmonize these two decisions. We do note the following pronouncements made in the Dant-Russell case:

> "The law is settled that a state or a subdivision thereof may not constitutionally levy a tax upon a thing during the time it retains its character as an import and remains the property of an importer in a warehouse in the original form or package in which it was imported.
>
> "The case of Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 115 A. 900, 26 ALR 965, cited by respondent and apparently strenuously urged in the trial court, which reaches a contrary conclusion has been expressly disapproved as the law of this state. (See Philippine Ref. Corp. v. Contra Costa County, 24 Cal. App. 2d, 665, 669, 76 P. 2d, 163."

The Board of Tax Appeals, therefore, determines that the imported ores included by the Tax Commissioner within the average monthly inventory base should not have been included therein. In so doing the commissioner erred.

The constitutional issue of storage discrimination is affirmed for want of jurisdiction. The Tax Commissioner's order respecting the inclusion of imports in average monthly inventory values is reversed. The commissioner's order respecting engineering expense is affirmed.

[fol. 61] IN THE SUPREME COURT OF OHIO

Case Nos. 34868
34872

OPINION—Decided January 30, 1957

Taxation—Imported Fungible Commodity—Protection from State Tax Not Extended, When—Iron Ore—Personal Property Defined—Section 5701.03, Revised Code—"Drawings" Construed—Value for Tax Purposes Determined, How—Cost in Preparing Drawings Included in Book Cost of Construction Projects—Deduction Therefrom of Value of Drawings—Appeal from Tax Commissioner to Board of Tax Appeals—Sufficiency of Evidence to Sustain Order.

1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.

2. The word "drawings" as used in Section 5701.03, Revised Code, does not necessarily include specifications relating to drawings.

3. Even though the cost of drawings does not determine their true value for personal property tax assessment pur-
[fol. 62] poses, such cost is some evidence of such value at least at a time while the items to which such drawings relate

are being constructed and before the completion of those items.

4. Where a substantial cost in preparing a substantial number of drawings is included in the book cost of certain construction projects and where such book cost of such construction projects is taken as the value of those projects for personal property taxation purposes without any deduction therefrom for the value of such drawings, the Tax Commissioner cannot avoid the provisions of Section 5701.03, Revised Code, relating to "drawings" merely by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the cost of those projects.

5. Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the taxpayer, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf. (Paragraph three of the syllabus of *Block* v. *Glander, Tax Commr.*, 151 Ohio St., 381, approved and followed.)

Appeals from the Board of Tax Appeals.

The Youngstown Sheet & Tube Company, herein referred to as the taxpayer, is an Ohio corporation. In its 1954 return, it eliminated from the average value of its reported [fol. 63] manufacturing inventories certain inventories of property owned by it and held in various storage places in Ohio. The Tax Commissioner in his final order found these withheld inventories to be taxable. Furthermore, the Tax Commissioner in that order made no deduction from the tax base of any amount on account of "drawings" which the taxpayer claimed to be exempt from taxation.

On appeal to the Board of Tax Appeals, that board affirmed the orders of the Tax Commissioner so far as it related to the "drawings." With respect to the property held in storage, the taxpayer had contended that that provision of Section 5701.08, Revised Code, which, prior to September 30, 1955, read, "but merchandise * * * belonging to a nonresident of this state is not used in business in

this state if held in a storage warehouse for storage only," should have stricken therefrom the words "belonging to a nonresident of this state" for the reason that those words made such provision unconstitutional and that such provision when so revised excepted such property from taxation. The Board of Tax Appeals determined that it had no power to determine that any part of Section 5701.08, Revised Code, was unconstitutional and that it was therefore bound to render its decision in accordance with the provisions of that statute as it found them.

The taxpayer further contended that certain iron ores imported by it from foreign countries were exempt from taxation by reason of the provisions of Clause 2 of Section [fol. 64] 10 of Article I of the Constitution of the United States. This contention was sustained by the Board of Tax Appeals.

The cause is now before this court on appeals by the Tax Commissioner and by the taxpayer from the decision of the Board of Tax Appeals.

OPINION: TAFT, J.

For the reasons stated in *Allied Stores of Ohio, Inc.* v. *Bowers, Tax Commr., ante,* 116, the taxpayer's contentions with respect to property held in storage must be rejected, except to the extent that the property so held represented iron ores imported by the taxpayer from foreign countries.

As to such iron ores, the claim for tax exemption is based upon that provision of Clause 2 of Section 10 of Article I of the Constitution of the United States which reads:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *."

That constitutional provision has been applied so as to prevent a state tax on property imported from outside the United States so long as it remains in the original package. *Hooven & Allison Co.* v. *Evatt, Tax Commr.*, 324 U. S., 652, 89 L. Ed., 1252, 65 S. Ct., 870; *Brown* v. *Maryland*, 12 Wheat., 419, 6 L. Ed., 678; *Low* v. *Austin*, 13 Wall., 29, 20 L. Ed., 517.

However, where the original package in which property was so imported has been broken, it has been held that [fol. 65] the foregoing constitutional provision does not prevent imposition of a state tax upon the property which had previously been imported. *May* v. *New Orleans,* 178 U. S., 496, 44 L. Ed., 1165, 20 S. Ct., 976.

In the instant cases, it is not necessary to determine whether commodities, which are usually imported in bulk as is iron ore, may ever be exempt from state taxation by reason of that constitutional provision after such commodities have been taken from the ship or vessel that carried them to this country. Cf. *Mexican Petroleum Corp.* v. *City of South Portland,* 121 Me., 128, 115 A., 900, 26 A. L. R., 965, and *Tres Ritos Ranch Co.* v. *Abbott, Treas.,* 44 N. Mex., 556, 105 P. (2d), 1070, 130 A. L. R., 963, with *In re Taxes Pacific Guano & Fertilizer Co.,* 32 Hawaii, 431, and *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La., 604, 138 So., 117.

Although it does not appear that the Supreme Court of the United States has ever been called upon to determine when fungible goods, such as iron ore, cease to be imports within the meaning of the foregoing constitutional provision (see annotation, 89 L. Ed., 1279, 1284 *et seq.*), that court has by its five to four decision in *May* v. *New Orleans, supra,* provided some guidance with respect to that problem. In that case, it was held that, where goods were packaged in small packages by a manufacturer and then packed in a larger package for shipment, such goods, although still in the unbroken smaller packages, were subject to state taxation as soon as the large shipping package had been broken. [fol. 66] In the opinion by Mr. Justice Harlan it is said:

> "* * * the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation.
>
> "* * *
>
> "* * * the 'original package' in the present case was the box or case in which the goods imported were

shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

In the instant cases, it appears from the agreed statement of facts that the taxpayer imported iron ores from five different countries; that these ores were purchased for use in the taxpayer's furnaces; that the taxpayer *maintained a supply* of each of these "ores *sufficient to meet* its *estimated requirements for* * * * *at least three months*"; that these ores were moved into a port of entry on vessels, each of which carried only one particular grade of ore; that, at the port of entry, the entire cargo of ore from a particular vessel was discharged into railroad cars and transported in bulk to a *storage yard* in Youngstown, Ohio, *adjacent to the taxpayer's manufacturing facilities;* that there it was unloaded and placed in a separate storage pile in a separate area of the ore yard; that "a separate [fol. 67] storage pile was maintained for each" of the five grades of imported ore and no such grade of ore was mingled with other ore or property "except that *different vessel shipments* of * * * ore" from a particular country *"were piled* * * * *on top of* * * * *other" ore* from that particular country *"as such* additional *shipments arrived";* and that "from time to time, *as needed, a portion* of the * * * ore *in each* separate *storage pile was removed* from such pile and transported to * * * stock bins" or "stock houses * * * for use in * * * furnaces * * * of the" taxpayer.

If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.

If, as held in *May* v. *New Orleans, supra* (178 U. S., 496), goods still in their original manufacturer's package are taxable notwithstanding Clause 2 of Section 10 of Article I of the Constitution of the United States, if they were shipped in a larger package and the larger package has been broken, we cannot comprehend how a shipment of iron ore shipped and received in this country in one vessel can [fol. 68] be regarded as non-taxable by reason of that constitutional provision (1) after it has been mixed with other ore received from another vessel and (2) after part of such iron ore has been separated from the whole for use in manufacturing.

The taxpayer's complaint with respect to the failure of the Tax Commissioner to make any deduction from the tax base of any amount on account of "drawings" is based upon Section 5701.03, Revised Code, which, prior to October 4, 1955, read so far as pertinent:

> "* * * 'personal property' includes every tangible thing which is the subject of ownership * * * other than patterns, jigs, dies, drawings * * *."

The taxpayer's evidence as to the value of "drawings" is largely evidence as to the cost of drawings *and specifications*. The evidence in the record does not require the conclusion as a matter of law that the specifications referred to in this evidence of cost were part of the drawings. Actually, there is much that would support a conclusion that, although related to the drawings, the specifications were not a part of the drawings; and the Board of Tax Appeals apparently reached that conclusion. The statute relied on does not use the word "specifications."

However, the evidence does show conclusively that there were a very substantial number of drawings. Also, there is evidence disclosing that both the cost of such things as some of the "tracings, blueprints and supplies" and also the charges for some of the "detail draftsmen and tracers" amounted to several thousands of dollars. Without suggest- [fol. 69] ing that there is no other evidence as to value or cost of the drawings, we believe that anyone will concede that these items represented part of the cost of these draw-

ings. Even though the cost of drawings does not determine their "true value" for tax assessment purposes (see Sections 5711.21 and 5711.18, Revised Code), such cost is some evidence of such value, at least at a time as here while the items to which they relate are being constructed and before the completion of those items.

Notwithstanding the foregoing evidence as to the inclusion of a substantial cost in preparing a very substantial number of drawings in the book cost of the construction projects, which was taken as the value of those projects for taxation purposes, no deduction at all from that book cost was made for the value of "drawings." In such an instance, the Tax Commissioner cannot avoid the provisions of the statute relating to "drawings" by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the costs of those projects. Such arguments were rejected by this court in *Goodyear Aircraft Corp.* v. *Peck, Tax Commr.*, 162 Ohio St., 200, 122 N. E. (2d), 700.

As stated in paragraph three of the syllabus of *Bloch* v. *Glander, Tax Commr.*, 151 Ohio St., 381, 86 N. E. (2d), 318:

> "Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the appellant, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf."

[fol. 70] It follows that as to case No. 34872 the decision must be reversed and that as to case No. 34868 it must be affirmed except to the extent that it relates to the claimed deduction from the tax base on account of "drawings," and the cause is remanded to the Board of Tax Appeals for further proceedings.

Judgments accordingly.

WEYGANDT, C.J., ZIMMERMAN, BELL, MATTHIAS and HERBERT, JJ., concur.

STEWART, J., concurs except as to that portion of paragraph one of the syllabus between "(1)" and "(2)".

[fol. 71]

IN THE SUPREME COURT OF OHIO

Case No. 34868
34872

APPLICATION FOR REHEARING—Filed February 13, 1957

Youngstown Sheet & Tube Co., appellant in case No. 34868 and appellee in case No. 34872, applicant herein, respectfully requests rehearing of those cases for the following reasons:

First, rehearing on the issue of storage only is requested for the same reasons set forth in the application for rehearing in *Allied Stores of Ohio, Inc.* v. *Bowers*, 166 Ohio St., 116, filed this day by Allied Stores of Ohio, Inc.

Second, rehearing on the issue of applicant's imports is requested for the reason that the decision discriminates against bulk imports of iron ore by holding that any withdrawal from such imports destroys the exempt character of both. If this rule were to prevail and be applied consistently it would mean that packaged imports have a preferred status over fungibles. No court has held that the withdrawal of some packages from a shipment renders the entire shipment taxable, or that the co-mingling of separate shipments of packages impairs the immunity of the whole. Had applicant bailed, sacked, or in another way "packaged" its ore imports, removal of a number of packages would not alter the status of the rest, nor would co-mingling. No apparent reason presents itself for a different conclusion when the equivalent of several packages of ores is [fol. 72] taken away from an ore pile or added thereto.

Third, the decision uses the analogy of breaking a larger package, citing *May* v. *New Orleans*, 178 U. S., 496, 44 L. Ed., 1165, 20 S. Ct., 976. But that case did not hold, as the Court here does, that the whole shipment was a package, or that the shipment was made taxable by the breakage.

Fourth, the decision does not follow the case nearest the instant on the facts, *Hooven & Allison Co.* v. *Evatt, Tax*

Commissioner, 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct. 870, wherein the Supreme Court held that goods were entitled to exemption as imports until they were changed in form by introduction into the stream of manufacture. Under that holding appellant would be entitled to relief if it could have shown some kind of packaging, but presumably, absent such packaging it must be subjected to greater and disproportionate tax burdens.

Fifth, the underlying policy in all cases of conflict between federal and state jurisdiction is to achieve a balance of interests. By holding that all applicant's imports, including those still in storage in the yards, are taxable, the decision departs from this policy. State jurisdiction to tax is accorded prevailing weight over the constitutional prohibition.

For the reasons stated above, applicant respectfully requests that the court grant rehearing for the purposes of reconsidering its decisions in case No. 34868 and case No. 34872.

/s/ Carlton S. Dargusch, Sr., /s/ Jack H. Bertsch,
Attorneys for applicant.

[fol. 73]

BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION, STATE OF OHIO.

Case No. 34872

STIPULATION OF FACTS—Filed August 18, 1955

It is stipulated and agreed by and between counsel for the respective parties hereto that the following stipulation may be considered as the facts for all purposes pertinent to the consideration and decision of the above case, subject, however, to the right of either party to offer additional evidence concerning engineering expenditures including the value of drawings, specifications and other detail incident thereto.

1. The Youngstown Sheet and Tube Company, Appellant herein, is a corporation organized and existing under and

by virtue of the laws of the State of Ohio, with its principal office located in the Stambaugh Building, Youngstown, Ohio, and with plants for the manufacture of iron and steel (including products) in Mahoning and Trumbull Counties, Ohio. Exhibits A and B attached hereto and made a part hereof.

2. The tax year in question is the year 1954, and the property covered thereby was listed as of January 1, 1954, except inventory, which was averaged on a twelve months basis for the calendar year 1953.

3. (Omitted).

[fol. 74] 4. There was included by Appellee, as taxable, for the year 1954 iron ores of a value of $1,393,232, which had been imported by Appellant from foreign countries, namely, Brazil, Cuba, Mexico, Liberia, and Canada. Exhibit D attached hereto and made a part hereof. Said imported ores were kept adjacent to Appellant's manufacturing facilities in a structure having two parallel walls, and on which there was located a movable ore bridge. (Exhibits A and B supra).

The Brazilian, Cuban, Mexican, and Liberian ores were purchased for ultimate use in Appellant's open hearth furnaces, and the Seine River ore was purchased for ultimate use in Appellant's blast furnaces. The Brazilian, Cuban, Mexican, and Liberian ores were transported by ocean vessels to the port of entry into this country, which was either Baltimore or Philadelphia. In the movement of these ores a steamship was chartered for each movement which involved only a single and particular grade of ore. The imported ore was loaded into the vessel at the foreign port and transported in bulk by such vessel to the port of entry. At the port of entry the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk by rail from the port of entry to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to the Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage

pile in a separate area of the ore yard where it was held for ultimate use in the open hearth furnaces of Appellant. [fol. 75] The importation of the Seine River ore (a single and particular grade of ore) involved a lake vessel movement from a Canadian port to Cleveland, Ohio. The imported ore was transported by vessel in bulk to the port of entry (Cleveland, Ohio). At Cleveland, Ohio the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk from Cleveland by rail to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard, where it was held for ultimate use in the blast furnaces of Appellant.

A separate storage pile was maintained for each grade of imported ore, i.e. Brazilian, Cuban, Mexican, Liberian and Seine River, and such particular grade of imported ore was not commingled with other ore or property of the Appellant except that different vessel shipments of identical ore were piled one on top of the other as such additional shipments arrived (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian, and Canadian on Canadian).

From time to time, as needed, a portion of the imported ore in each separate storage pile was removed from such pile and transported to the stock bins in the case of the blast furnaces and stock houses in the case of the open hearth furnaces for use in said blast furnaces and open hearth furnaces of the Appellant. Exhibits A and B supra.

Appellant maintained a supply of imported ores sufficient [fol. 76] to meet its estimated requirements for a period of at least three months.

5. (Omitted).

6. The assessments made by the Tax Commissioner by Preliminary Assessment Certificate, dated August 23, 1954, by Amended Preliminary Assessment Certificate, dated August 30, 1954, and as determined in the Journal Entry, dated March 2, 1954, were as set forth on the "Summary of

Valuations by Taxing District". Exhibit F attached hereto and made a part hereof.

7. As used herein, the words, "imported" or "importation", shall not be deemed to be dispositive of the question in issue as to whether the subject ores imported from Brazil, Cuba, Mexico, Liberia, or Canada retained their characteristics as imports immune from state taxation where said ores had been commingled in the ore yards of Appellant with ores of the same kind (i.e. Brazilian with Brazilian, Cuban with Cuban, Mexican with Mexican, Liberian with Liberian, and Canadian with Canadian) from other separate vessel shipments and where a portion of such commingled ores had been withdrawn for use in the blast or open hearth furnaces of Appellant.

8. All values, as set forth in Exhibits C to E, inclusive, are book values taken from Appellant's books.

/s/ C. William O'Neill, Attorney General, State of Ohio, /s/ Larry H. Snyder, Assistant Attorney missioner of Ohio.

/s/ Carlton S. Dargusch, Sr., Attorney for The Youngstown Sheet & Tube Company.

Note

p. 37 (Exhibit A) is outsized and is not reproducible

[fol. 77a] **Exhibit B**

Map showing general layout of buildings of Campbell and Struthers Works of Youngstown Sheet and Tube Company

(See Opposite) ☞

Note

p. 39 (Exhibit B) is not economically reproducible

[fol. 78]

Exhibit D

The Youngstown Sheet and Tube Company
1954 Ohio Personal Property Tax

Inventory of Iron Ore Imported from Foreign Countries

Summary by Taxing District

	Average Monthly Inventory Value
Trumbull County:	
City of Girard	$ 119,126
Mahoning County:	
City of Youngstown	37,666
City of Campbell	874,711
City of Struthers—Poland Township	361,729
Total Mahoning County	$1,274,106
Grand Total	$1,393,232

Detail

Location and Description of Ore	Ultimate Use of Ore	Average Monthly Inventory Value
Brier Hill Works:		
West Storage Yard—City of Girard:		
Brazilian Ore	Open Hearth Furnaces	$ 60,915
Cuban Ore	Open Hearth Furnaces	23,384
Mexican Ore	Open Hearth Furnaces	34,827
Total West Storage Yard		$ 119,126

Open Hearth Stock House—City of Youngstown		
Brazilian Ore	Open Hearth Furnaces	$ 26,008
Mexican Ore	Open Hearth Furnaces	9,549
Liberian Ore	Open Hearth Furnaces	2,109
Total Open Hearth Stock House		$ 37,666
Total Brier Hill Works		$ 156,792
CAMPBELL WORKS:		
Blast Furnace Ore Yard—City of Campbell:		
Seine River Ore	Blast Furnace	$ 791,787
Open Hearth Stock House—City of Campbell:		
Brazilian Ore	Open Hearth Furnaces	$ 62,458
Cuban Ore	Open Hearth Furnaces	3,238
Mexican Ore	Open Hearth Furnaces	13,969
Liberian Ore	Open Hearth Furnaces	3,259
Struthers Storage Yard—City of Struthers—Poland Township:		$ 82,924
Brazilian Ore	Open Hearth Furnaces	$ 353,780
Cuban Ore	Open Hearth Furnaces	7,949
Total Rod and Wire Storage Yard		$ 361,729
Total Campbell Works		$1,236,440
Grand Total		$1,393,232

[fol. 79]

Schedule 1

EXHIBIT F.

The Youngstown Sheet and Tube Company
1954 Ohio Personal Property Tax

Summary of Valuations by Taxing District
(Trumbull, Mahoning, Ashtabula and Cuyahoga Counties)

	True Value Based on Preliminary Certificate 8-23-54	True Value Based on Amended Preliminary Certificate 8-30-54		True Value Based on Journal Entry Dated March 2, 1955	
		Increase	Amended Value	Increase	Amended Value
Schedule 2—Machinery and Equipment:					
Trumbull County:					
Village of Hubbard	$ 411,724	—	411,724	—	411,724
Township of Hubbard	7,198	—	7,198	—	7,198
City of Girard	3,014,124	—	3,014,124	—	3,014,124
Mahoning County:					
City of Youngstown	9,872,384	—	9,872,384	947,065	10,819,449
City of Campbell	22,131,286	—	22,131,286	825,739	22,957,025
City of Struthers—Coitsville Township	1,246,796	—	1,246,796	3,085,077	4,331,873

[fol. 80]

City of Struthers—Poland Township	3,152,433	—	3,152,433	39,772	3,192,205
Total Schedule 2	$39,835,345	—	39,835,945	4,897,653	44,733,598
Schedule 3—Inventories (Manufacturing):					
Ashtabula County:					
City of Ashtabula	—	873,033	873,033	—	873,033
Cuyahoga County:					
Bedford Township	—	714,779	714,779	—	714,779
Trumbull County:					
Village of Hubbard	$ 539,715	—	539,715	—	539,715
City of Girard	600,373	677,637	1,278,010	119,126	1,397,136
Mahoning County:					
City of Youngstown	3,793,556	2,102,414	5,895,970	37,666	5,933,636
City of Campbell	7,831,775	5,053,590	12,885,365	874,711	13,760,076
City of Struthers—Coitsville Township	170,350	—	170,350	—	170,350
City of Struthers—Poland Township	2,429,021	2,620,682	5,049,703	361,729	5,411,432
Total Schedule 3	$15,364,790	12,042,135	27,406,925	1,393,232	28,800,157
Total Schedules 2 and 3	$55,200,735	12,042,135	67,242,870	6,290,885	73,533,755

[fol. 81]

	True Value Based on Preliminary Certificate 8-23-54	True Value Based on Amended Preliminary Certificate 8-30-54		True Value Based on Journal Entry Dated March 2, 1955	
		Increase	Amended Value	Increase	Amended Value
Assessed Value at 50%	$27,600,360	6,021,080	33,621,440		
Add:					
Assessed Values—Schedule 3-A:					
Mahoning County	4,940	—	4,940		
Cuyahoga County	1,190	—	1,190		
Assessed Values—Schedule 4:					
Trumbull County	700	—	700		
Mahoning County	148,990	—	148,990		
Total Assessed Value	$27,756,180	6,021,080	33,777,260		
Assessed Value Per Preliminary Assessment Certificates:					
Trumbull County	$ 2,287,270	338,820	2,626,090		
Mahoning County	25,467,720	4,888,350	30,356,070		
Ashtabula County	—	436,520	436,520		
Cuyahoga County	1,190	357,390	358,580		
Total Assessed Value, as above	$27,756,180	6,021,080	33,777,260		

[fol. 82] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83]

IN THE SUPREME COURT OF THE STATE OF OHIO

JOURNAL ENTRIES

Tuesday, June 25, 1957. Journal No. 42, p. 353.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until August 3 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Monday, July 29, 1957. Journal No. 42, p. 368.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until September 30 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Tuesday, October 1, 1957. Journal No. 42, p. 393.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until October 31 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 3]

IN SUPREME COURT OF OHIO

No. 34868

THE YOUNGSTOWN SHEET & TUBE COMPANY, Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

Appeal from the Board of Tax Appeals

EXCERPTS FROM MEMORANDA OF PLEADINGS, ETC. FILED WRITS ISSUED, ETC., JUDGMENTS, ORDERS AND DECREES

Journal No. 42, page 242.

Appeal from the Board of Tax Appeals:

JOURNAL ENTRY OF JUDGMENT—January 30, 1957

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed except to the extent that it relates to the claimed deduction from the tax base on account of "drawings", and the cause is remanded to the Board of Tax Appeals for further proceedings.

ORDERED, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

[fol. 4] Journal No. 42, page 259.

Rehearing Docket:

JOURNAL ENTRY OF ORDER DENYING REHEARING—February 20, 1957

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 5] [File endorsement omitted]
[fol. 6]

IN THE SUPREME COURT OF OHIO

YOUNGSTOWN SHEET AND TUBE CO., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

CERTIFICATE OF SUPREME COURT OF OHIO AS TO CONSTITUTIONAL QUESTION—Filed May 20, 1957

On motion of the appellant, Youngstown Sheet and Tube Co., it is ordered to be certified and made a part of the record of the proceeding and of the judgment of the Court in the cause that by its appeal from the Board of Tax Appeals, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said Section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations and that the Court found, pursuant to appeal, briefs and oral argument of counsel, (and by its decision in Allied Stores of Ohio, Inc. v. Bowers, 166 OS 116) that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the [fol. 7] Section to include Appellant within the exception; that therefore the Section must stand; that so standing and so construed the Section was not repugnant to the United States Constitution or if repugnant, had nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the Court's decision.

Witness The Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio

/s/ Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 10]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 34868

YOUNGSTOWN SHEET AND TUBE CO., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 30, 1957

I. Notice is herewith given that Youngstown Sheet and Tube Co., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio affirming the Board of Tax Appeals of Ohio, such final judgment having been entered on January 30, 1957, and from the final judgment of the said Supreme Court of Ohio denying the appellant's application for rehearing entered on February 20, 1957.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in the cause, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

1) A copy of the final determination of the Tax Commissioner.

2) A copy of appellant's notice of appeal from the Tax Commissioner's final determination, as filed with the Board of Tax Appeals.

3) A copy of the opinion of the Board of Tax Appeals of Ohio in this case.

4) A copy of the opinion of the Board of Tax Appeals of Ohio in *Allied Stores of Ohio* v. *Bowers*.

5) A copy of the notice of appeal from the Board of Tax Appeals, as filed with this Court on behalf of the appellant.

6) A copy of the opinion of this Court in this case.

7) A copy of the opinion of this Court in *Allied Stores of Ohio* v. *Bowers* (No. 34926), 166 O.S. 116.

8) A copy of the application for rehearing, as filed with this Court on behalf of the appellant.

[fol. 11] 9) A transcript of docket and journal entries of this Court in this cause, on the merits and on application for rehearing.

10) A transcript of all transcripts and evidence certified by the Board of Tax Appeals to this Court.

III. The following questions are presented by this appeal:

1. Does former Section 5701.08, Revised Code, deny the appellant equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

2. Does a statute which excepts from property tax, merchandise belonging to nonresidents when held for storage only, but taxes such merchandise belonging to residents deny residents equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

/s/ Carlton S. Dargusch, Attorney for Youngstown Sheet and Tube Co., Appellant, 33 North High Street, Columbus 15, Ohio.

[fol. 12] PROOF OF SERVICE (omitted in printing).

[fol. 13] CERTIFICATE OF SERVICE (omitted in printing).

[fols. 15-18] Opinion and Order of Tax Commissioner appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 5.

[fols. 24-43] Opinion and Order of Board of Tax Appeals appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 8.

[fols. 66-75] Opinion in Nos. 34872 and 34868, Taft, J., appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 25.

[fols. 84-85] Application for Rehearing in Nos. 34872 and 34868 appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 32.

[fol. 86]

BEFORE THE BOARD OF TAX APPEALS
Department of Taxation
State of Ohio

Case No. 34868

STIPULATION OF FACTS—Filed August 18, 1955

It is stipulated and agreed by and between counsel for the respective parties hereto that the following stipulation may be considered as the facts for all purposes pertinent to the consideration and decision of the above case, subject, however, to the right of either party to offer additional evidence concerning engineering expenditures including the value of drawings, specifications and other detail incident thereto.

1. The Youngstown Sheet and Tube Company, Appellant herein, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal office located in the Stambaugh Building, Youngstown, Ohio, and with plants for the manufacture of iron and Steel (including products) in Mahoning and Trumbull Counties, Ohio. Exhibits A and B attached hereto and made a part hereof.

2. The tax year in question is the year 1954, and the property covered thereby was listed as of January 1, 1954, except inventory, which was averaged on a twelve months basis for the calendar year 1953.

3. (Omitted).

4. (Omitted).

[fol. 87] 5. There was included by Appellee, as taxable, for the year 1954 certain tangible personal property, consisting of raw materials and finished seamless pipe (sic) as set forth in Exhibit E, attached hereto and made a part thereof.

Said tangible personal property consisted of:

(a) Iron ore, produced in the United States and stored (in a rectangular structure having four walls

and on two walls of which there was located a movable ore bridge) on Lake Erie public docks at Ashtabula, Ashtabula County, and Bedford, Cuyahoga County, and held for ultimate use in manufacturing. The Lake Erie public docks at Bedford (Cuyahoga County) were owned, controlled and operated by the Erie Dock Company, and the Lake Erie public docks at Ashtabula (Ashtabula County) were owned, controlled and operated by the Ashtabula and Buffalo Dock Co.

(b) Raw materials consisting of iron ore, coal, scrap, limestone, fluor spar, ferros and additions stored adjacent to Appellant's manufacturing facilities in Trumbull and Mahoning Counties and held for ultimate use in manufacturing by Appellant. The domestic iron ore at Appellant's manufacturing facilities was stored in the same manner and in the same type of structure as the imported ore. The Appellant's properties in Trumbull and Mahoning Counties were enclosed by wire fences and other enclosures.

[fol. 88] (c) Finished seamless pipe manufactured in Ohio and stored in the pipe storage yard adjacent to Appellant's manufacturing facilities in Mahoning County and held for ultimate sale by Appellant.

With the exception of the iron ore stored on Lake Erie public docks, all inventories were located on properties of Appellant and were under its control at all times. Exhibits A and B supra.

The raw materials, consisting of domestic and imported iron ore, coal, scrap, limestone, fluor spar, ferros and additions, were in saleable form, as was the finished seamless pipe. Said raw materials were not held by Appellant for resale but were held by the Appellant for use in manufacturing. The finished seamless pipe was held for ultimate sale by Appellant.

6. The assessments made by the Tax Commissioner by Preliminary Assessment Certificate, dated August 23, 1954, by Amended Preliminary Assessment Certificate, dated August 30, 1954, and as determined in the Journal Entry, dated March 2, 1954, were as set forth on the "Summary of

Valuations by Taxing District." Exhibit F attached hereto and made a part hereof.

7. (Omitted).

8. All values, as set forth in Exhibits C to E, inclusive, are book values taken from Appellant's books.

/s/ C. William O'Neill, Attorney General, State of Ohio, /s/ Larry H. Snyder, Assistant Attorney General, State of Ohio, Attorneys for Tax Commissioner of Ohio.

/s/ Carlton S. Dargusch, Sr., Attorney for the Youngstown Sheet & Tube Company.

[fols. 89-90] EXHIBITS A and B appearing in certified transcript at this point are omitted since they are printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 37.

[fol. 89A]

EXHIBIT E.

Schedule 4

The Youngstown Sheet and Tube Company
1954 Ohio Personal Property Tax
Inventory of Merchandise Kept Within Ohio

	Average Monthly Inventory Value
Summary by Taxing District	
Ashtabula County:	
City of Ashtabula:	
Iron Ore	$ 873,033
Cuyahoga County:	
Township of Bedford:	
Iron Ore	$ 714,779
Trumbull County:	
City of Girard:	
Iron Ore	$ 7,721
Coal	153,939
Scrap	296,870
Limestone	14,718
Fluor Spar	22,090
Ferros and Additions	182,299
Total Trumbull County—City of Girard	$ 677,637

[fol. 90A]

Mahoning County:	
City of Youngstown:	
Iron Ore	$ 1,729,068
Coal	357,961
Limestone	11,044
Ferros and Additions	4,341
Total City of Youngstown	$ 2,102,414
City of Campbell:	
Iron Ore	$ 5,053,590
City of Struthers, Poland Township:	
Iron Ore	$ 27,186
Coal	1,701,741
Scrap	119,968
Limestone	26,383
Ferros and Additions	234,042
Finished Seamless Pipe	511,363
Total City of Struthers—Poland Township	$ 2,620,682
Total Mahoning County	$ 9,776,686
Grand Total—Material held for Storage Only	$12,042,135

[fol. 91]

Schedule 4-A
Sheet 1

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Iron Ore at Lake Erie Docks		
Iron Ore:		
Ashtabula Dock of The Ashtabula and Buffalo Dock Company—City of Ashtabula:		
Various Grades of Blast Furnace Ore	Blast Furnaces	$ 873,033
Randall Dock of the Erie Dock Company—Township of Bedford:		
Various Grades of Blast Furnace Ore	Blast Furnaces	714,779
Total Iron Ore at Lake Erie Docks		$ 1,587,812
Brier Hill Works		
Iron Ore:		
Blast Furnace Ore Yard—City of Youngstown:		
Various Grades of Blast Furnace Ore	Blast Furnaces	$ 1,729,068
West Storage Yard—City of Girard:		
Zenith Lump Open Hearth Ore	Open Hearth Furnaces	7,721
Total Iron Ore		$ 1,736,789

[fol. 92]

Coal:			
West Storage Yard—City of Girard:			
Steam Coal	Steam Boilers	$	35,069
High Volatile Coal	Coke Ovens		76,760
Low Volatile Coal	Coke Ovens		42,110
Total West Storage Yard			153,939
Storage Yard at Old Benzol Plant—City of Youngstown:			
High Volatile Coal	Coke Ovens		256,348
Low Volatile Coal	Coke Ovens		101,613
Total Storage Yard at Old Benzol Plant			357,961
Total Coal			511,900
Scrap:			
West Storage Yard—City of Girard:			
Various Grades of Blast Furnace Scrap	Blast Furnaces	$	1,427
Various Grades of Open Hearth Scrap	Open Hearth Furnaces		295,443
Total Scrap		$	296,870
Limestone:			
West Storage Yard—City of Girard:			
Blast Furnace Limestone	Blast Furnaces	$	10,139

[fol. 93]

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Open Hearth Limestone	Open Hearth Furnaces	4,579
Total West Storage Yard		14,718
At East End of Blast Furnace Ore Yard—City of Youngstown:		
Blast Furnace Limestone	Blast Furnaces	370
Open Hearth Limestone	Open Hearth Furnaces	6,475
Total East End of Blast Furnace Ore Yard		6,845
At West End of Blast Furnace Ore Yard—City of Youngstown:		
Blast Furnace Limestone	Blast Furnaces	4,199
Total Limestone		$ 25,762
Fluor Spar:		
West Storage Yard—City of Girard	Open Hearth Furnaces	$ 22,090

[fol. 94]

Schedule 4-A
Sheet 2

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Brier Hill Works—Continued		
Ferros and Additions:		
West Storage Yard—City of Girard:		
Ferros and Additions	Open Hearth Furnaces	$ 182,299
At East End of Blast Furnace Ore Yard—City of Youngstown:		
Dolomite	Blast Furnaces	2,378
At West End of Blast Furnace Ore Yard—City of Youngstown:		
Dolomite	Blast Furnaces	1,963
Total Ferros and Additions		$ 186,640
Total Brier Hill Works		$ 2,780,051

[fol. 95]

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Campbell Works		
Iron Ore:		
Blast Furnace Ore Yard—City of Campbell:		
Various Grades of Blast Furnace Ore	Blast Furnaces	$ 5,053,590
Struthers Storage Yard—City of Struthers—Poland Township:		
Zenith Lump Open Hearth Ore	Open Hearth Furnaces	27,186
Total Iron Ore		$ 5,080,776
Coal:		
Struthers Storage Yard—City of Struthers—Poland Towship:		
Steam Coal	Steam Boilers	$ 87,110
Gas Coal	Gas Producers (Seamless)	46,006
High Volatile Coal	Coke Ovens	896,032
Low Volatile Coal	Coke Ovens	672,593
Total Coal		$ 1,701,741
Scrap:		
Struthers Storage Yard—City of Struthers—Poland Towship:		
Various Grades of Open Hearth Scrap	Open Hearth Furnaces	$ 119,968

[fol. 96]

Limestone:		
Struthers Storage Yard—City of Struthers—Poland Township:		
Blast Furnace Limestone	Blast Furnaces	$ 18,142
Open Hearth Limestone	Open Hearth Furnaces	8,241
Total Limestone		$ 26,383
Ferros and Additions:		
Struthers Storage Yard—City of Struthers—Poland Township:		
Ferros and Additions	Blast Furnaces	$ 23,197
Ferros and Additions	Open Hearth Furnaces	210,845
Total Ferros and Additions		$ 234,042
Finished Seamless Pipe:		
Struthers Storage Yard—City of Struthers—Poland Township	For Shipment	$ 511,362
Total Campbell Works		$ 7,674,272
Grand Total—Material Held for Storage Only		$12,042,135

[fols. 97-99] EXHIBIT F appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 42.

[fol. 100] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 101]

IN THE SUPREME COURT OF THE STATE OF OHIO

JOURNAL ENTRIES

Tuesday, June 25, 1957 Journal No. 42, p. 352.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until August 3 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Monday, July 29, 1957. Journal No. 42, p. 368.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until September 30 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Tuesday, October 1, 1957. Journal No. 42, p. 393.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until October 31 for docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 102]

SUPREME COURT OF THE UNITED STATES

Nos. 588 and 589, October Term, 1957

[Title omitted]

Appeals from the Supreme Court of the State of Ohio.

ORDER NOTING PROBABLE JURISDICTION—January 6, 1958

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 44

UNITED STATES PLYWOOD CORPORATION,
PETITIONER,

vs.

CITY OF ALGOMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED APRIL 1, 1958
CERTIORARI GRANTED MAY 19, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 44

UNITED STATES PLYWOOD CORPORATION,
PETITIONER,

vs.

CITY OF ALGOMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

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[fol. 3]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY STATE OF WISCONSIN

Case No. 4390

UNITED STATES PLYWOOD CORPORATION, a foreign corporation, Plaintiff,

v.

CITY OF ALGOMA, a Wisconsin municipal corporation, Defendant.

COMPLAINT—Filed April 5, 1956

The Plaintiff by Whyte, Hirschboeck & Minahan, its attorneys complains against the defendant as follows:

1. At all times hereinafter mentioned the plaintiff was and now is a corporation duly organized and existing under the laws of the State of New York and is licensed to do business in the State of Wisconsin. Plaintiff conducts its business in the State of Wisconsin, under the name of Algoma Plywood and Veneer Company, a division, whose principal office and place of business is the City of Algoma, Wisconsin.

2. At all times hereinafter mentioned the defendant, City of Algoma, was and now is a municipal corporation existing pursuant to Chapter 62 of the Statutes of Wisconsin and is situated in the County of Kewaunee, State of Wisconsin.

3. On or about May 1, 1955 Plaintiff owned certain real estate and improvements situated in the City of Algoma, Wisconsin which were assessed to plaintiff by defendant under the General Property Tax and placed on the assessment roll and billed to plaintiff in the amounts shown below:

Tax Bill No.	Tax Roll Page	Assessed Valuation	General Property Tax
72	132	$ 333,660.00	$ 6,191.16
73	129	36,120.00	670.22
74	132	29,890.00	554.62
75	80	10,130.00	187.97
76	50	7,320.00	135.82
77	47	1,080.00	20.04
78	49	2,348,090.00	43,569.51
79	29	2,820.00	52.33
80	9 L60	13,750.00	255.14
81	52	2,850.00	52.88
82	129	14,880.00	276.10
83	153	9,080.00	168.48
		$2,809,670.00	$52,134.27

[fol. 4] The aforesaid assessment was segregated as follows:

Land, manufacturing	$ 101,840.00	
Improvements	2,660,800.00	
	$2,762,640.00	
Unimproved lots	6,750.00	
Residential lots and improvements	40,280.00	
	$2,809,670.00	

The foregoing assessment is grossly in excess of the full value which could ordinarily be obtained for such real estate and improvements, and any part thereof, at a private sale and, without limiting the generality of the foregoing, said manufacturing land valuation computation plaintiff is informed and believes was based on a price of approximately $5,000 per acre which bears no relation to a private sale price and does not consider the characteristics of the soil, its location, and its adaptability or its cost, selling prices of similar properties, or other relevant considerations; the assessments of manufacturing improvements, residential lots and improvements are grossly in excess of any price obtainable at a private sale or any reconstructed private sale prices which could be arrived at by a combination of

cost less depreciation, replacement cost, sales of similar property, or other relevant valuation criteria.

4. On or about May 1, 1955, plaintiff owned certain personal property situated in the City of Algoma which was assessed by defendant to plaintiff under the General Property Tax and placed on the assessment roll and billed to plaintiff in the following amounts:

Bill No. 12—Page 2, Line 21

	Assessment	*Tax*
Manufacturers Stock (Contains $144,296.26 of imported veneers)	$1,936,805.00	
Logs, timber	71,925.00	
Machinery, tools, etc.	98,440.00	
Furniture and fixtures	25,050.00	
All other	71,360.00	
	$2,203,580.00	$40,888.12

The imported veneers included in Manufacturers Stock were shipped into this state from foreign countries and [fol. 5] were in storage on May 1, 1955 in their original package. Such veneers are exempt from state taxation under Article I, Section 10, Clause 2 of the United States Constitution which prohibits the states from levying duties on imports. The assessment on personal property does not reflect the true cash value of the items assessed and, without limiting the generality of the foregoing, the assessment on logs and timber is not the true cash value and is excessive in that it erroneously includes certain freight charges and over-values the timber stock; and the assessment made on machinery, tools, etc. is grossly in excess of their true cash value.

5. For the reasons above stated, on or about August 24, 1955 Plaintiff duly and timely presented written objections to the aforesaid assessments to the Board of Review of the City of Algoma conformably with Wis. Stats. Sec. 70.47.

6. On or about September 19, 1955 Plaintiff duly appeared before the Board of Review of the City of Algoma

in support of its objections and its authorized representatives in good faith presented evidence to such Board in support of its objections and made full disclosure under oath before said Board of Review of all of its property liable to assessment and the value thereof.

7. Thereafter the Board of Review of the defendant City, by order dated September 29, 1955 affirmed all of the assessments made by the City Assessor, without change.

8. On the 4th day of January, 1956, plaintiff paid to the City Treasurer of Algoma, Wisconsin, Under Protest, the General Property Taxes assessed and levied against it for 1955 of $93,022.39, claiming that said taxes were excessive and illegally assessed and levied.

9. On or about the 6th day of January, 1956, plaintiff duly and timely filed with the City Clerk and the Common Council of the City of Algoma its claim for refund of taxes in the amount of $93,022.39 conformably with Wisconsin [fol. 6] Statutes Sec. 74.73(4) as repealed and recreated by Chapter 440, Laws of 1955. A copy of said refund claim is attached hereto and made a part hereof as though set forth at length.

10. Plaintiff has not been informed of any action taken by Defendant on its claim and more than sixty (60) days have elapsed since it was filed. Accordingly, plaintiff brings the action within ninety (90) days after the claim was filed.

11. Plaintiff has duly complied with all conditions prescribed by law for the recovery of the said excessive and illegal property taxes and the interest thereon.

Wherefore, Plaintiff demands judgment against the defendant in the amount of ninety three thousand twenty two dollars and thirty nine cents ($93,022.39) with interest thereon from January 4, 1956 together with the costs and disbursements of this action.

/s/ Whyte, Hirschboeck & Minahan, Attorneys for Plaintiff.

P. O. Address: Suite 604, 735 North Water Street, Milwaukee 2, Wisconsin.

[File endorsement omitted]

[fol. 7] *Duly sworn to by Martin R. Browning, jurat omitted in printing.*

[fol. 8] ATTACHMENT TO COMPLAINT

ALGOMA PLYWOOD & VENEER COMPANY

Algoma, Wisconsin

A DIVISION OF

UNITED STATES PLYWOOD CORPORATION

(Emblem)

CLAIM FOR TAX REFUND

January 6, 1956

To: City Clerk,
City of Algoma
City Hall
Algoma, Wisconsin

The Common Council
City of Algoma
City Hall
Algoma, Wisconsin

Please Take Notice, that Algoma Plywood and Veneer Company, a Division of United States Plywood Corporation (hereinafter called "Claimant"), of Algoma, Wisconsin, hereby claims against the City of Algoma under the provisions of Wisconsin Statutes Sec. 74.73(4) as repealed and recreated by Chapter 440, Laws of 1955, refund of the sum of $93,022.39, said sum being the taxes paid under Protest by the Claimant on January 4, 1956, on property situated in the City of Algoma, Wisconsin, which taxes were excessive and illegally assessed and levied as hereinafter stated, by said City of Algoma for the year 1955.

The 1955 property tax paid by Claimant of $93,022.39 was levied upon an assessed valuation of $5,013,250.00 which [fol. 9] was made up of the following items:

Real Property		
Land, Manufacturing	$ 101,840.00	
Improvements	2,660,800.00	
	2,762,640.00	
Unimproved Lots	6,750.00	
Residential Lots and Improvements	40,280.00	
Total		$2,809,670.00
Personal Property		
Manufacturers Stock	$1,936,805.00*	
Logs, Timber, etc.	71,925.00	
Machinery, Tools, etc.	98,440.00	
Furniture & Fixtures	25,050.00	
All Others	71,360.00	
Total		$2,203,580.00
		$5,013,250.00

*Includes $144,296.26 of imported veneers.

This claim for refund is based upon the fact that the entire assessment was illegal and excessive and more specifically without limiting the generality of the foregoing, the real property assessment on land and improvements was grossly in excess of that value obtainable at a private sale, the criteria required by Wis. Stats. Sec. 70.32; the assessment on imported veneers is unconstitutional in violation of Article I, Sec. 10, Clause 2 of the United States Constitution which prohibits the state from laying duties on imports; the assessment of logs and timber was excessive, and the assessment of repair and maintenance parts was excessive.

[fol. 10]

Dated this 6th day of January, 1956.

ALGOMA PLYWOOD AND VENEER COMPANY
(A Division of United States
Plywood Corporation)

By /s/ F. D. KAMBACH
F. D. Kambach, Treasurer

By /s/ JOHN P. SCHLICK
John P. Schlick, Treasurer for
United States Plywood Corporation

[fol. 12] [File endorsement omitted]

IN CIRCUIT COURT OF KEWAUNEE COUNTY,
STATE OF WISCONSIN

[Title omitted]

ANSWER—Filed May 1, 1956

The above named defendant by S. Knudson and by Larkin and Blum, its attorneys, answers plaintiff's complaint as follows:

1. That defendant denies that the assessment of real estate and improvements, referred to in paragraph number 3 of plaintiff's complaint, on or about May 1, 1955, was in excess of the full value which could ordinarily be obtained for such real estate and improvements at a private sale; that defendant denies that such assessment and the valuation of said real estate and improvements bears no relation to a private sale price or does not consider the characteristics of the soil, its location, and its adaptability, or the selling prices of similar properties, and other relevant considerations; that defendant denies that such assessment and the valuation of said real estate and improvements are in excess of any price obtainable at a private sale or any reconstructed private sale prices which could be ar- [fol. 13] rived at by a combination of cost less depreciation, replacement cost, sales of similar properties and other relevant valuation criteria;

2. That defendant has not knowledge or information sufficient to form a belief that the imported veneers mentioned in paragraph number 4 of plaintiff's complaint were shipped into this state from foreign countries or were in storage on May 1, 1955, in their original package and for such reason defendant denies the same; that defendant denies that the assessment on personal property mentioned in paragraph number 4 of plaintiff's complaint does not reflect the true cash value of the items assessed, and denies that such assessment on logs and timber as mentioned in said paragraph is not the true cash value, and denies that such assessment of said logs and timber er-

roneously includes freight charges, and denies that such assessment of said logs and timber over-values the timber stock and that the assessment of the machinery, tools, etc. mentioned in said paragraph number 4 is in excess of their true cash value;

3. That defendant has not knowledge or information sufficient to form a belief that plaintiff on or about September 19, 1955, before the Board of Review of the City of Algoma made full disclosure under oath of all of plaintiff's property liable to assessment and the value thereof;

[fol. 14] 4. That defendant has not knowledge or information sufficient to form a belief that plaintiff's claim for refund of taxes, referred to in paragraph number 9 of plaintiff's complaint, was filed conformably with Wisconsin Statutes Section 74.73(4) as repealed and recreated by Chapter 440, Laws of 1955;

5. That defendant has not knowledge or information sufficient to form a belief that plaintiff has complied with all conditions prescribed by law for the recovery of property taxes and interest thereon, as alleged in paragraph number 11 of plaintiff's complaint, and for such reason defendant denies the same;

Wherefore, Defendant demands judgment that plaintiff's complaint be dismissed and defendant recover its costs and disbursements herein.

S. Knudson, Post Office Address: City of Algoma, County of Kewaunee, State of Wisconsin and Larkin and Blum, Post Office Address: 303 South Barstow Street, City of Eau Claire, County of Eau Claire, State of Wisconsin, Attorneys for defendant.

[fol. 15] *Duly sworn to by Anna M. Birdsall, jurat omitted in printing.*

[fol. 17] Acknowledgment of service (omitted in printing.)

[fol. 18] [File endorsement omitted]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY,
STATE OF WISCONSIN

UNITED STATES PLYWOOD CORPORATION,
A Foreign Corporation, Plaintiff,

v.

CITY OF ALGOMA, A Wisconsin Municipal Corporation,
Defendant.

MEMORANDUM DECISION—October 24, 1956

Plaintiff owns and operates as one of its divisions a plywood and veneer plant in the city of Algoma. It paid its real and personal property taxes for the year 1955 under protest and brings this action against the city under sec. 74.73 to recover the portions of such taxes claimed to have been illegally exacted. The action involves questions of exemptions of imports and excessive valuations. There is also involved a question of duplication of taxes.

(a) Imported Veneers and Lumber

In the manufacture of its veneered products the plaintiff uses both domestic and foreign lumber and veneers. The latter is directly imported by plaintiff as importer from Canada, France and the Belgian Congo. From Canada comes birch veneer, from France, French oak veneer, and from Africa, species of veneer known as korina and fuma. The veneers, both foreign and domestic, are shipped to plaintiff in bundles or wooden crates,—mostly the former. The bundles are secured by metal straps, and they, like the crates, undoubtedly meet all the requirements of an "original package", as that term is used in the cases when [fol. 19] taxability of imports by a state depends upon whether the goods are in the original package in which they were imported. The foreign lumber is imported by plaintiff directly from Ontario, Canada. The species are

birch and cedar. The lumber is used as core material. When received, it is piled in plaintiff's yard. It is claimed that each individual piece of lumber in a pile constituted an original package. The foreign veneers are kept stored in a warehouse until needed in manufacture, and, when needed, the packages are broken, and the individual pieces then commence their journey through the plant to become part of a veneered product.

Plaintiff reported as personal property subject to the state's ad valorem personal property tax all foreign veneers that had been taken from original packages on May 1st, 1955, and all foreign lumber that had been taken from piles in the yard to be run through the plant, but claimed, and still claims, that all imported veneers in its warehouse that remained in unbroken original packages and all imported lumber that remained in piles in its yard were immune from taxation under clause 2 of sec. 10 of Art. I of the Federal Constitution, which, so far as here material provides:

> "No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws . . . "

The asserted immunity is based upon *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678, and *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 65 S. Ct. 870, 89 L. ed. 1252. In the last mentioned case (hereinafter referred to as the *Hooven* case) the taxpayer was a manufacturer of cordage and other similar products in which it used foreign hemp, which it imported in bales. The question before the court [fol. 20] was the taxability of the hemp while remaining in bales in the taxpayer's warehouse and awaiting use. Such hemp was regarded as being in original packages and non-taxable. The *Hooven* case would be dispositive, in plaintiff's favor, of the question of the taxability of any part of the foreign veneers remaining in the warehouse in their original packages (and likewise dispositive of taxability of lumber if it be assumed both that each individual piece of lumber constituted an original package and that the lumber did not enter the manufacturing process until

taken from piles and run through the plant) were it not for the following language of the court:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (89 L. ed. 1264)

Acting, no doubt, under the authority of an opinion of the Attorney General rendered November 10th, 1949 (38 A. O. G. 563), which is to the effect that the *Hooven* case did not close the door to taxation of that part of a manufacturer's stock of imported raw materials essential to current manufacturing operations notwithstanding that such materials on hand May 1st remained in their original packages, the assessor taxed against the petitioner the value of one-half of the imported veneers then in the [fol. 21] taxpayer's warehouse in original packages and imported lumber in piles, being of the opinion that one-half of such stock on hand was needed to meet current operational requirements.

As I understand one of the arguments of the taxpayer, it is to the effect that other portions of the majority opinion in the *Hooven* case, by necessary implication, dispel the notion that the supreme court intended to leave open the question of whether raw materials on hand in

original packages but needed by a manufacturer-taxpayer to meet his current manufacturing requirements is subject to an ad valorem personal property tax notwithstanding that the manufacturer is the importer. I consider, however, that the express reservation of the question contained in the language above quoted outweighs any implications to the contrary and requires the conclusion that the question with which we are now concerned remains open. I do not find in *Gardner-Richardson* v. *Evatt* (1946), 145 O. 363, 61 N. E. 2d 704, any consideration of the question whether such portion of a manufacturer's raw materials as was needed for current operational requirements was subject to tax nor any holding that such portion was not taxable. That point does not appear to have been considered.

In the *Hooven* case the court, before reserving the question above indicated, in part said:

> "It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, 'there must be a point of time when the prohibition ceases, and the power of the state to tax commences.' Brown v. Maryland, supra (12 Wheat. (US) 441, 6 L. ed. 686)." (89 L. ed. 1259)
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> • • • • • • • •
>
> [fol. 22] "The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases." (89 L. ed. 1264)

There is nothing sacrosanct in the original package rule. Goods which come into this country on purchase by one engaged in the importing business and which are in turn sold in their original packages to a domestic manufacturer-user lose their constitutional immunity from state taxation

as imports the moment the sale is made by the importer to the manufacturer. They then become taxable to the manufacturer as in the case of other property. *Waring* v. *Mobile*, 8 Wall. (US) 110, 19 L. ed. 342.

The taxpayer sees in any departure from the original package rule,—that is to say, the rule that the immunity of contents of an original package from state taxation continues until the package is broken,—in the instant situation future problems involving tests which will be much more difficult of application than the original package test and which, it is claimed, will result in such lack of uniformity and confusion as to require adherence to a rule that all imports in original packages continue to enjoy immunity until the package is broken. I do not consider that any such difficulties provide sound and sufficient reasons for exempting a manufacturer from the state's personal property tax on that portion of his imported raw materials which he has himself imported and which remain in their original packages to the extent that such goods are needed to meet current operational needs. Lack of an infallibly accurate test does not argue against a power to tax. In this connection the dissenting opinion of Justice Black in the *Hooven* case should be considered.

[fol. 23] If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax.

By what criterion should a manufacturer's current or immediate need of a certain raw material be determined? In this connection the characteristics of Wisconsin's ad

valorem personal property tax require further consideration. It is, first of all, a tax that is not a levy in lien form against property but a tax assessed against the owner of the property. It is assessed as of May 1st. The taxpayer is not liable for tax on property that he may own the day before May 1st but does not own on the latter date; nor may he avoid the tax on property which he owns on May 1st but disposes of on May 2nd. The May 1st circumstances are those that control.

I think that an importer-user of foreign raw materials may be subjected to the Wisconsin personal property tax on such part of such materials remaining in original packages as he has on hand May 1st and which he will be required to have on hand in the immediate future to meet his [fol. 24] manufacturing needs for the period that would normally be required for him to secure additions to the inventory if he placed his order on May 1st, assuming the conduct of his business in the usual and normal manner. To illustrate: Assume a Wisconsin daily newspaper company that buys its newsprint from Canada. Its presses use 5 jumbo rolls of newsprint per day, each roll constituting an original package. Assume also that an order for newsprint requires 20 days for delivery. Assume further that the company customarily keeps on hand about 300 jumbo rolls and that it has on hand May 1st exactly 300 rolls. It would thus appear that the presence of at least 100 rolls in the warehouse was indispensable to continuous publication of the newspaper unless purchases were made from a nearby domestic owner, in which case the newsprint so purchased would not enjoy the immunity, because of the doctrine that a sale by a domestic importer puts an end to the immunity as an import. *Waring* v. *Mobile, supra.* I do not believe that the intent of the *Brown* and *Hooven* cases would prevent Wisconsin from assessing its personal property tax against 100 rolls of newsprint on hand May 1st. The situation as it existed on that day was that the company could not, short of 20 days, import additional newsprint, and unless it had a 20-day supply on hand there could be no continuous publication of the newspaper with newsprint imported by the newspaper company from Canada. While of the 300 rolls

on hand 200 could be regarded as surplus stock, certainly 100 rolls constituted the minimum requirement of current needs and should be regarded as being so irrevocably appropriated to use by the newspaper company as to have entered the process of publishing a local newspaper. I do not consider that the fact that orders placed before May 1st [fol. 25] may have assured delivery of further newsprint before May 20th argues against the validity of the suggested criterion in the application of Wisconsin's *May 1st* personal property tax.

There are, of course, other criteria that may reasonably be used to determine in a practical manner what raw materials a manufacturer must have on hand to assure continuous operations. Counsel for the city has in this case suggested a "manufacturing cycle" test, and it may be that that test is better than the one indicated above. The "manufacturing cycle" test amply supports the conclusion of the assessor that one-half of the foreign imports on hand May 1st were required to be on hand to meet plaintiff's immediate needs.

In its report of taxable personal property, submitted by the taxpayer pursuant to sec. 70.35 (1) on June 7th, 1955, the following statement appears (Exhibit 8, page 4):

"Non-assessable Raw Materials (Note A) $288,593."

* * * * * * * *

"(Note A) Non-assessable Raw Materials consist of veneers and lumber, which are imported into the United States from Africa, Canada, and France upon which import duties have been paid to the Customs Department of the United States Treasury. These raw materials are stored in our raw material storage depot on May 1, 1955, in their original crates, cartons, bindings, etc., as such were received from Foreign countries at Ports of Entry."

Without attempting to draw any fine distinction between the lumber and veneers, the assessor determined that one-half the total, or $144,296.26, was taxable because needed to meet current operational requirements. The assessor reached his conclusion after study, inspection and observation of plaintiff's business and methods. Analysis of

Exhibit 36, which shows how long the foreign veneers and lumber would have lasted had such raw materials on [fol. 26] hand May 1st been used to fill orders rather than any subsequently received materials, sufficiently proves that the taxpayer had on hand not less than $144,296.26 in value of foreign veneers and lumber which were required to be on hand to meet current operational requirements. I do not think that the Federal Constitution requires that the assessor make separate determinations as to each separate class or specie of imports so long as the overall result remains within the value of total imports that have lost their character as such for purposes of an ad valorem state tax assessed against the owner. If the criterion suggested by the Court is a proper one, it may be claimed that the evidence lacks proof as to how long it would take to obtain a shipment of some of the imports. The burden of proof in this respect becomes important, but even though it rested with the city, Mr. Kambach's testimony as to the time it takes to obtain a shipment of French or African veneer, together with reasonable probabilities as to the time it takes to secure shipments of other imports, leaves the assessor's determination that imports to the value of $144,296.26 as being assessable against plaintiff fair and reasonable to the company.

What has been said assumes the taxability of lumber to be limited to operational needs as in the case of veneers. That was the assessor's view. But I think in such respect he was in error in not regarding a larger portion than one-half of the foreign lumber as being taxable. The taxpayer did not set aside any particular part of its lumber storage yard or veneer warehouse for the storage of foreign materials. Veneers were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, [fol. 27] for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use. It is not considered, however, that there was such commingling of foreign and domestic veneers or foreign and domestic lumber as to cause a loss of identity.

Most of the foreign lumber when received was "green". Apparently most of the domestic lumber was purchased green also. All lumber when received was piled in a manner to facilitate air drying. While the method of piling adopted was intended also to prevent decay, it cannot be said that this was the dominant purpose. It appears that air drying never sufficiently removes the moisture content of lumber to permit its use by plaintiff without running the lumber through the dry kilns. It also appears that green lumber is not generally run through the dry kilns without a period of air drying and that it is not "good business practice" so to do. It is the normal procedure or practice that should and does control, and I think, at least as to the lumber received green—which accounts for most of the Canadian lumber—that when it was received and piled, the dominant purpose was to prepare it for use by air drying, thus by a slower but more economical process accomplishing in part what kiln drying would accomplish.

There is no evidence as to the proportion of Canadian lumber that was on hand that was received green except that most of it was. If it be claimed that lumber already partially air dried but sufficiently dry to be run through the dry kilns as a matter of good business practice was not subjected on piling to the processes of manufacture, I think that, conceding the validity of such claim, it, nevertheless, becomes clear that green lumber on receipt and piling entered the "process of manufacture" and lost im-[fol. 28] munity as an import. In the *Hooven* case the court said:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported." (89 L. ed. 1264)

The assessor would have been warranted in taxing all of the green Canadian lumber. When received by the taxpayer it was not ready for use if good business practices were followed by the taxpayer. When the company received the lumber it immediately proceeded to make it

ready for use by subjecting it to the air drying. Such air drying was part of its manufacturing practices.

A further question has been raised in connection with imports, and that is whether each individual piece of lumber constituted an original package. This lumber comes in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and of standard widths, such as 4 inches or 6 inches. Counsel for the taxpayer cites the case of *Dant & Russell, Inc.* v. *Board of Supervisors of Los Angeles County* (Cal. App. 1942), 128 P. 2d 389, as authoritatively deciding that each individual piece of lumber in a shipment received by the taxpayer from Canada was an original package. Language in the opinion in that case is to such effect. The supreme court of California, however, reversed the decision (133 P. 2d 817 (1943)). While the reversal was on other grounds, the same appellate court that rendered the decision, later declared that the effect of the supreme court's decision was to "black out" and leave without any "authoritative value or standing" the determination that each piece of lumber was an original package and came to the opposite conclusion. *E. J. Stanton & Sons* v. *Los Angeles County* (1947), 78 Cal. App. 2d 181, 177 P. 2d 804. In the last mentioned case it appears that [fol. 29] Stanton was engaged in the wholesale and retail lumber business. He imported lumber which, as in the instant case, was shipped loose,—that is, not bundled or fastened together in any other way. He was taxed on the portion of the shipment that remained after sales had been made from such shipment. The tax was upheld. The supreme court of California refused a hearing, and the United States supreme court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. See *Simon* v. *City of Los Angeles* (Cal. App., April 24th, 1956), 296 P. 2d 381, where the court gives effect to the decision in the *Stanton* case as follows:

> "The power of the county to tax was thus upheld upon the theory that the 'aggregation of articles imported' constituted in legal concept an original package which was broken when some of the parts of the 'aggregation' were sold locally. The case undoubtedly represents the law applicable to a situation where packaging is in-

herently impossible or impracticable. Our Supreme Court refused a hearing and the United States Supreme Court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. But the Stanton case does not control imports which actually are in packages. In such instances the question is what is the original form or package."

The evidence here was not directed to the ascertainment of whether the foreign lumber on hand May 1st consisted of broken or unbroken shipments. Such determination is unimportant to the sustainability of the assessment upon the grounds assigned by the assessor.

[fol. 30] *(b) Excessive Valuation Of Real And Personal Property*

Plaintiff operates a large industrial plant in a small city. Its real estate consists of two plants, known as the Perry Street Plant and the Navarino Street Plant. In addition to the lands which are used industrially plaintiff owns three residences and three vacant residence lots. The latter six parcels of real estate were separately assessed in the manner usual in such cases (Exhibits 13 to 18). No complaint is made of these assessments. The complaint goes to the valuation of the industrial lands and buildings and certain items of personal property.

Plaintiff's right to question the taxation of imports does not necessarily rest on sec. 74.73, but its right to a refund based upon "allegedly excessive assessments", whether of real or personal property, does. Counsel for the city calls attention to sec. 74.73-(2), which in part provides that

"No claim shall be allowed and no action shall be maintained under the provisions of this section unless it shall appear that the plaintiff has paid more than his equitable share of such taxes."

and to *Krom* v. *Antigo*, 220 Wis. 542, *Highlander* v. *Dodgeville*, 249 Wis. 502, and *Yawkey-Bissel Corp.* v. *Langlade*, 261 Wis. 524, which deal with plaintiff's burden in establishing that he "has paid more than his equitable share of such

taxes", and urges the Court to dispose of the claims of excessive assessments for reasons set forth in his brief as follows:

"It is defendant's position that *Highlander* v. *Dodgeville, supra,* rules the case at bar and that plaintiff has not offered evidence sufficient to cause the Court to act in weighing the evidence. Even if the assessment had been in an amount three times the fair market value of plaintiff's property, plaintiff could not have recovered unless it proved that the rest, or a substantial part of the rest, of the property in Algoma had been assessed on a different basis, such as only twice its fair market value. The burden of proof is on the plaintiff, and the presumption exists in favor of the correctness of the assessment. Under the *Krom* and *Highlander* cases, *supra,* plaintiff has offered insufficient evidence, and there is nothing to be considered by the court except the constitutional question.

[fol. 31] "In *Yawkey-Bissell Corp.* v. *Langlade,* 261 Wis. 524, 53 N.W. 2d 174 (1952) the taxpayer recovered for the reason that since 'the cutover lands in question were illegally assessed in 1948 at more than their full value, and no other property in the township was assessed at more than one-half of such value, such assessment of such lands was clearly illegal.' (page 527) This holding is a confirmation of the rule in *Highlander* v. *Dodgeville, supra,* and a practical application of that rule in setting up the requirements which a taxpayer must fulfill in order to recover. Plaintiff in the case at bar has not met those requirements.

"Assuming, as claimed by plaintiff, that the lands, the buildings, the logs and the repairs and maintenance parts of plaintiff were overassessed, and that there was a duplication of assessment in respect to machinery and furniture and fixtures, plaintiff has nevertheless, made insufficient showing to entitle it to recover. Since plaintiff failed to offer any testimony as to the value of the other real estate owned by it in Algoma and described in plaintiff's exhibits 13, 14, 15,

16, 17 and 18, plaintiff has failed to show that its property, taken as a whole, was assessed at more than its full market value, and that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property in Algoma. The burden of proof is on the plaintiff, and plaintiff did not even offer evidence to prove that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property."

The city's position is that by simply proving an assessment for more than market value a taxpayer does not make out a case for a refund. Plaintiff must go further, it is argued, and establish by evidence other than the testimony of the assessor that at least a substantial portion of other property in the taxing district is not assessed for more than market value. Merit in the argument is to be found in the probability that there has not yet been born an assessor who would admit on the witness stand that his purpose was to assess all property at 100% or 60% of true market value, as the case may be, but as to plaintiff he assessed at a higher percentage. Hence, a rule that would permit a taxpayer to recover a refund based upon an excess over a percentage assessment, which the assessor will always claim he applied to all similar property, upon mere proof that in plaintiff's case the assessor did not follow his rule, would, as a practical matter, permit plaintiff to make out a case under the statute without proving that the same injustice or error which infects his assessment does not also infect the assessment of at least a substantial portion of the taxpayers in his district.

[fol. 32] The city's contention that the plaintiff failed to prove that its residence lots and property were not assessed at less than full market value requires dismissal of the plaintiff's claims to an over-assessment of other of its property involves a question which would deserve serious consideration in the case of a taxpayer who owns two pieces of property—say, a merchant who owns a downtown store and also his residence—and in protesting the assessment of the store proves only its over-valuation without at the same time proving that there has been no under-

valuation of his home or the stock of merchandise in his store, on the theory that he stands before the court asking an equitable accounting of his taxes due his city and that he should not be permitted to recover any amount unless his aggregate tax bill is too high. While the equitable considerations in such a situation are apparent, they need receive no more attention here, because it is obvious that no conceivably reasonable claim of undervaluation of plaintiff's residence property could offset an over-valuation of plaintiff's industrial property by an amount that would leave a net over-assessment so small, under plaintiff's theory of values, as not to deserve consideration under the rule of the *Krom* and *Highlander* cases.

Acts passed by the 1953 and 1955 legislatures here require consideration. The 1953 legislature added subsec. (4) to sec. 74.73, thereby denying to a taxpayer the right to maintain a plenary action, such as the instant one, to recover as a refund the portion of his taxes which he established constituted an unjust share under the decisions of our supreme court and thus relegated him to certiorari proceedings under sec. 70.47 (9) (a) or to invoking the remedy before the department of taxation provided for by sec. 70.85.

The legislature, by Chapter 111 of the Laws of 1955, which became effective May 11th, 1955, changed sec. 70.49 (2) to read as follows:

> [fol. 33] "The value of all real and personal property entered into the assessment roll to which such affidavit is attached by the assessor shall, in all actions and proceedings involving such values, *be presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other.*

Previously the statute made the values appearing on the roll *"presumptive evidence of the full market value"* of the property only.

The same legislature, by Chapter 440 of the Laws of 1955, effective July 26th, 1955, repealed and recreated subsec. (4) of sec. 74.73 so as to again permit suit to be brought to obtain a refund of taxes on account of an excessive assess-

ment. It is clear that the act which restored the cause of action did not dispense with or change any of the requisites of a cause of action under the statute, as established by prior decisions, and is, therefore, not here important.

Counsel for plaintiff does not contend that the change in sec. 70.49 (2) does not broaden and give more scope to the presumption accorded an assessment but does contend that it is inapplicable here because the new statute was not passed until May 11th, 1955. With this contention I disagree. The amendment merely changed a rule of evidence and did not affect any vested right. The change in the rule *did not operate to* give to an assessment a conclusive effect as distinguished from a presumptive effect. The present statute has application to this action, which was commenced long after the statute took effect. *Estate of Sletto,* 224 Wis. 178, 181; *Will of McNaughton,* 138 Wis. 179, 189; *Flanders v. Town of Merrimack,* 48 Wis. 567, 570. The assessment in the instant case actually was made after May 11th, 1955. While under sec. 70.10 assessments are required to be made as of the close of May 1st, they need not be completed before the first Monday in July. Taxpayer's personal property statement (Exhibit 8), filed in accordance with sec. 70.35, was not required to be filed before May 25th and was not filed until long after May 11th. *Northern Supply Co.* v. *City of Milwaukee,* 255 Wis. 509, is, clearly, not controlling.

[fol. 34] *Freight On Logs.* Complaint is made because the assessor, in arriving at the true cash value of certain logs on hand as part of the company's raw materials, took the figure at which the cost of the logs appeared on the company's books, which was $71,925. This cost, naturally, included the freight paid by the company. It appears that these logs are usually bought from places in northern Wisconsin and Minnesota, and that the logs were purchased F. O. B. the landing point or point of origin. Based upon testimony of Mr. Kambach that on a single occasion, and for reasons that do not appear, some logs were sold to a veneer plant in Menasha, the company assuming the freight, it is claimed that if plaintiff should not use its logs but should sell them instead, it would have to bear the freight, and, therefore, in computing the true cash value, freight which the plaintiff paid should be excluded. Naturally, if plaintiff

purchased logs from a certain point in northern Minnesota, paying the freight, and later sold some of such logs to a plant in Menasha, the Menasha buyer would not pay more than it would cost him to get the logs from northern Minnesota, and no doubt the freight to Menasha would not be more than to Algoma. This testimony falls far short of proving that the assessor erred in assessing the logs for $71,925, which was the cost of the logs to the company as shown on the company's books. I perceive no merit in plaintiff's contention. I think it can be safely said that, normally, any manufacturer deciding to sell off part of his raw materials rather than using them would have difficulty in realizing cost. As to other items of raw materials into which freight enters as a part of cost, no complaint is made that injustice is done by taking cost per the company's books as being the true cash value.

Repair And Maintenance Parts. The assessor added to plaintiff's personal property the company's repair and maintenance parts, which were carried on the books in the amount of $71,360 as prepaid expense, such figure representing cost, [fol. 35] but which had not been returned as assessable property. He valued this property at cost. While it is argued that this property should not be valued at cost, plaintiff offered no proof of value whatever, and there is nothing in the record in the way of proof that establishes that cost to plaintiff was not true cash value. Mere claim that an assessed value is too high falls far short of establishing a cause of action for a refund. See the *Krom* and *Highlander* cases, supra.

Industrial Lands And Buildings. Plaintiff claims that the assessed valuation of industrial buildings should be reduced from $1,297,066 to $586,000, under the proofs made, and the lands reduced from $101,840 to $16,485, and a refund of taxes ordered accordingly. The over-all assessment problem which plaintiff's properties create is self-evident. Plaintiff was dissatisfied with the 1954 assessment and filed a petition with the tax commission for a reassessment. Instead of ordering reassessment, the tax commission directed a supervised assessment to be made, pursuant to the statutes, in the year 1955, and to this method of procedure plaintiff did

not object. The commission appointed J. D. Semrad to supervise the assessment. Plaintiff protested its assessments before the board of review, and the board confirmed the assessments made.

At the trial plaintiff produced Kenneth Sarles as its chief expert witness. Richard Bourguignon, who assisted in preparing an appraisal, also testified in plaintiff's behalf as an expert. Both Mr. Semrad and Mr. Sarles qualified as experts, with an imposing experience background, and they differed radically as to the formula or method most reliable in determining market value of plaintiff's plant. Comparable sales as a criterion of value of the plant were non-existent. The market value of the plant—land, buildings and fixtures—lies in theory. Market value of the buildings and fixtures independently of the land also lies in [fol. 36] theory. The market value of bare industrial lands finds some test in the market value of neighboring lands. Conflict between these experts was to be expected. Mr. Semrad, however, does not stand before the Court as a paid expert employed by a private litigant. He was employed by the state tax commission to supervise a reassessment.

As to the value of the plants, including industrial lands, the testimony of Mr. Semrad sufficiently supports these values, and they must be sustained. *Wisconsin Malting Co.* v. *Manitowoc*, 225 Wis. 393. It should be noted that the basis upon which the plaintiff acquired these properties was not made to appear in evidence. Did it or did it not make its purchase on the basis of certain values being assigned to the tangible assets of the old company? While the plaintiff did not buy the assets of the old company but bought the outstanding capital stock instead, it seems reasonable to suppose that in the negotiations the market value of the physical plant received some consideration.

Duplication. The company reported (Exhibit 8) its machinery and tools constituting personal property at $98,445, and furniture, fixtures and equipment constituting personal property at $25,053. These were the depreciated values per the company's books. These values were accepted and reduced to round figures at $98,440 and $25,050, or a total of $123,490, and assessment was made accordingly. Mr. Semrad was not satisfied, however, to accept the depreciated

cost figures of machinery and equipment forming part of the real estate, which was all that the company had supplied him. He called for a statement of cost as to such items, and received Exhibit 10, which lists costs at $1,694,095.92, depreciation at $879,393, and net book value at $814,702.92. [fol. 37] Because of the great increase in costs in recent years Semrad added 15% to costs and then reduced that figure by 30% to arrive at present cash value. No complaint is now made as to such method of valuation, nor was any proof offered tending to show that the resulting figures were too high. It developed at the trial that in furnishing Exhibit 10 the company did not exclude machinery and equipment falling within the classification of personal property, and as a result Semrad was misled and inadvertently included in the assessment of $1,363,740 for fixed machinery and equipment in the Perry Street plant (Exhibit 20) and in the Navarino plant (Exhibit 19) the above mentioned personal property already assessed at the sum of $123,490.

I think that this showing calls for a holding that plaintiff is entitled to a refund in an amount it has satisfactorily proved its taxes were increased by the error. And I think, too, that no time should be spent on the proposition that had the error not been made, it may be questionable whether the total tax bill would have been less, because I believe that had the company listed in Exhibit 10 only its machinery and equipment constituting fixtures, Mr. Semrad would have employed the same percentages that he actually used in arriving at value. The duplication was the result of an inadvertent act. It was a mistake. And I think that it is such a mistake as, under the rationale of the decision in *State ex rel Pabst B. Co.* v. *Kotecki*, 163 Wis. 101, must be remedied, even though plaintiff did not produce proof of the value of the fixed machinery and equipment forming part of the real estate after excluding the duplicated items.

Counsel for plaintiff in his computations assumes that because the company reported the depreciated value May 1st, [fol. 38] 1955, of machinery and equipment constituting personal property as being a certain percentage of the May 1st, 1955, depreciated value of all machinery and equipment, whether personal property or forming part of the real estate (Exhibit 8), the same percentage must be used in re-

constructing the cost of machinery and equipment appearing on Exhibit 10 and which the assessor used as a starting point. That, of course, cannot be done because of the different rates of depreciation that were applied to different classes of machinery and equipment. I think that the refund should be based on what here appears as a certainty. Taken as personal property, the tax assessed amounted to $123,490 x .0185553, or $2,291.39. Taken as fixtures, the exact tax assessed is not determinable. If, as fixtures, the same property was taxed at a higher sum, plaintiff has not proved the amount. If taxed at a lesser sum, the city should not be heard to say that although it collected taxes on this property as real estate it should not refund the tax it has also collected on the property as personalty because there is a failure of definite proof as to the amount of taxes resulting from the assessment as real estate. The taxpayer is entitled to a refund in the amount of $2,291.39, with interest.

In General. Except as respects the constitutionality of the tax on imports and the unintended duplication of certain items of personal property, plaintiff's complaint in general simmers down to this: that the city of Algoma has assessed its real estate at values that exceed fair market value and certain of its personal property at values that exceed true cash value. It asks the Court to remedy such situation by adopting its own experts' ideas of value as to the lands and bare buildings. In fixing the true cash value [fol. 39] of logs it asks the Court to adopt a rule based upon an isolated experience that would appear to be contrary to common practice of manufacturers in valuing their raw material. As to repair and maintenance parts it produced no evidence of value but yet maintains that the Court should cut the assessor's figures one-half. I think it may be fairly said that what plaintiff in effect seeks to do is to make an assessor out of the Court. In *Buildings Development Co. v. Milwaukee*, 225 Wis. 357, 364, the court said:

> "But property owners must, in all but plain cases of breach of statutory duty, rely on just and fair treatment by assessing authorities, rather than the courts, for avoidance of intolerable assessments. We perceive nothing in the record before us to warrant the court in interfering with the instant assessments."

Plaintiff contends that the proof establishes a cause of action under sec. 74.73 justifying, if not requiring, reduction of building valuations from $1,297,066 to $586,000 and land values from $101,840 to $16,485. It is earnestly argued that reductions should be to the latter figures. Such a reduction would mean that the land assessment has been slightly more than six times market value and would convict Mr. Semrad of either an inexcusably neglectful performance of his duties or gross incompetency, although his history of employment by the tax commission to supervise assessments and the study made of values in this case and justification of values would indicate the exact contrary. Does the disparity between land value figures cast more doubt on the reliability of the testimony of plaintiff's experts than on Mr. Semrad? The presumption which the statute gives to the correctness of an assessor's figures would appear to be entitled to its strongest application when an assessment is supervised by an expert appointed by the tax commission.

We certainly do not here have such a case of injustice [fols. 40-41] as was established by the proofs of *Yawkey-Bissel Co.* v. *Antigo, supra.* Mr. Bosman's testimony, essentially hearsay in character, and the evidence as to the assessment of the Algoma Lumber Company lands, and the comparison made of their value to that of plaintiff's lands, fall far short of establishing a case for a refund within the rule of the *Highlander* case. The evidence does not warrant me in holding that the assessments are so substantially out of line with other assessments as to impose an inequitable tax burden. To grant a refund the case must be one in which the proofs warrant the court in holding, with a reasonable certainty of being right, that the taxpayer has paid a certain number of dollars too much in relation to other taxpayers. This is not such a case.

Plaintiff proposes a finding to the effect that Mr. Semrad as supervisor made the assessments without the concurrence of Mr. Graf, the city's assessor, and it is claimed that the assessment is illegal for that reason. The assessor and the supervisor acted together. Both signed the statutory affidavit attached to the assessment roll. Which of the two wrote the figures upon the assessment roll is not important.

Plaintiff is entitled to a refund on account of the duplication above dealt with, and that is all. As to costs, plaintiff

is entitled, I consider, to a $100 attorney fee and clerk's fees, and that other disbursements should be limited to two days attendance on the part of Mr. Kambach as a witness. I consider that only his testimony was essential to the proof of the duplication.

Dated this 24th day of October, 1956.

By the Court,

E. M. Duquaine, Circuit Judge.

[fol. 42]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY, STATE OF WISCONSIN.

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW— October 24, 1956

The issues joined in this action having come on for trial before the above named court and having been tried, the plaintiff appearing by Messrs. Whyte, Hirschboeck & Minahan, and defendant appearing by Messrs. Larkin & Blum and by S. Knudson, City Attorney, and after hearing the proofs of the parties and the arguments of counsel, and being advised in the premises,

Now, Therefore, I, The Hon. E. M. Duquaine, the judge before whom the same was tried, Do Decide And Find As

FINDINGS OF FACT

1. Plaintiff is a foreign corporation, licensed to do business in the State of Wisconsin, and was the owner of land, improvements and personal property within the City of Algoma, Kewaunee County, Wisconsin, on May 1st, 1955.

2. The City of Algoma comprises a taxing district within the State of Wisconsin for the assessment of property taxes upon land, improvements and personal property.

3. The City of Algoma assessed the real and personal property of plaintiff for taxation as of May 1st, 1955. Such

assessment was a supervised assessment under Wisconsin Statutes, the supervisor being Mr. J. D. Semrad. The city's assessor and said supervisor acted together in making the assessments, and both signed the statutory affidavit attached to the assessment roll. Plaintiff filed written objections to its assessments, and hearing on the same was held before the Board of Review of the City of Algoma. The Board of Review affirmed the assessments. Plaintiff paid [fol. 43] its real and personal property taxes for the year 1955, under protest, on January 4th, 1956. The city council took no action upon plaintiff's claim for refund, and plaintiff commenced this action on April 2nd, 1956.

4. In the manufacture of its products plaintiff uses both foreign and domestic wood veneers. Foreign veneers are directly imported by plaintiff as importer from Canada, France and the Belgian Congo. Such foreign veneers are received by plaintiff at its plant in Algoma in the original packages in which they are shipped. They are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of a veneered product.

5. Plaintiff also uses both foreign and domestic lumber in its manufacturing operations. Foreign lumber is directly imported by plaintiff as importer from Ontario, Canada, the species being birch and cedar. The lumber is imported in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and standard widths, such as 4 inches and 6 inches. It is shipped loose in railroad cars, the sticks or individual pieces of lumber not being bundled or fastened together in any other way. Most of the foreign lumber is purchased and received "green". The lumber when received is piled in plaintiff's storage yard in such manner as to facilitate air-drying and with the dominant purpose of subjecting the lumber to air-drying before converting it into a manufactured product. Air-drying does not sufficiently remove moisture from lumber to enable plaintiff to use it in its products. Some kiln-drying is necessary to bring the lumber to the degree of dryness requisite for use by plaintiff. While green lumber may be wholly kiln-dried, it is plaintiff's practice, and also good business practice, to subject green lumber to air-drying before running the lumber through the

dry kilns. That is more economical than wholly kiln-drying [fol. 44] green lumber. Most of the foreign lumber on hand in piles in the storage yard on May 1st, 1955, was lumber which had been received in green condition, and all such green lumber was then being subjected to the manufacture for which it was imported.

6. The foreign veneers on hand in warehouse in original packages and foreign lumber in piles in storage yard on hand May 1st, 1955, were of the value of $288,593. The assessor determined that one-half of the imported veneers and lumber were necessarily on hand to meet plaintiff's current operational needs as a manufacturer and assessed against plaintiff for personal property taxes the value of one-half of such foreign veneers and lumber, or $144,296.26. The assessor's determination was fair to the plaintiff, and it is the Court's finding that at least one-half of said foreign veneers and lumber and of the value of $144,296.26 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer.

7. Veneer logs, which were assessed at a valuation of $75,925, were not assessed in excess of true cash value. Repair and maintenance parts, which were assessed at a valuation of $71,360, were not assessed in excess of true cash value.

8. Plaintiff's industrial real property was not assessed at more than full value which could ordinarily be obtained therefor at private sale.

9. In the valuation of $1,363,740 placed upon fixed machinery and equipment forming part of the industrial real estate there was inadvertently included by the assessor items of machinery, tools, furniture, fixtures and equipment constituting personal property separately assessed as personal property at a valuation of $123,490, and on account of which taxes in the amount of $2,291.39 were levied. No proof was adduced by plaintiff that fixed machinery and equipment, excluding the said items taxed as personalty, had a market value less than $1,363,749.

[fols. 45-46] Upon the foregoing Findings of Fact I make the following:

Conclusions of Law

1. The assessment of one-half the imported veneers and lumber on hand May 1st, 1955, at a valuation of $144,296.26 and the levy of a personal property tax thereon based on such valuation was not in violation of Article I, section 10, clause 2, of the United States Constitution.

2. Plaintiff has failed to establish a cause of action for a refund of taxes based upon real estate being assessed at more than full market value which could ordinarily be obtained therefor at private sale or personal property being assessed in excess of true cash value or based upon assessments made against plaintiff being so substantially out of line with other assessments as to impose an inequitable tax burden.

3. By reason of Finding of Fact No. 9, and notwithstanding Conclusion of Law No. 2, plaintiff is entitled to a refund of the personal property taxes in the amount of $2,291.39 assessed against the personal property of the valuation of $123,490 mentioned in Finding of Fact No. 9.

4. Plaintiff is entitled to Judgment against the defendant for the sum of $2,291.39, together with interest at 5% from January 4th, 1956, and together with costs in the amount of $100, plus clerk's fees, plus witness fees for two days attendance by Mr. Kambach.

Let Judgment be entered accordingly.

Dated this 24th day of October, 1956.

By the Court,

E. M. Duquaine, Circuit Judge.

[File endorsement omitted]

[fol. 50]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY,
STATE OF WISCONSIN

UNITED STATES PLYWOOD CORPORATION,
A Foreign Corporation, Plaintiff,

v.

CITY OF ALGOMA,
A Wisconsin Municipal Corporation, Defendant.

JUDGMENT—January 11, 1957

The Court having by order herein, dated January 10th, 1957, directed that Judgment be entered herein in favor of the plaintiff and against the defendant, which order is on file herein;

Now, Therefore, In Pursuance of such order and On Motion of Larkin & Blum and S. Knudson, attorneys for said defendant,

It Is Adjudged That the plaintiff have and recover of and from the defendant the sum of $2,536.00.

Dated this 11th day of January, 1957.

By the Court.

/s/ Orville J. Albrecht, Clerk.

[File endorsement omitted]

[fol. 65]

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

UNITED STATES PLYWOOD CORPORATION,
a foreign corporation, Appellant,

v.

CITY OF ALGOMA,
a Wisconsin municipal corporation, Respondent.

JUDGMENT—January 7, 1958

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kewaunee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kewaunee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Ninety-nine Dollars and No Cents ($99.00).

Justices Brown, Currie and Steinle dissent.

[fol. 67]

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

August Term 1957
No. 120

UNITED STATES PLYWOOD CORP.,
a foreign corporation, Appellant,

v.

CITY OF ALGOMA,
Wis. municipal corporation, Respondent.

Appeal from a judgment of the circuit court for Kewaunee County: E. M. Duquaine, Circuit Judge. *Affirmed.*

OPINION—Filed January 7, 1958

Action by a manufacturer against a city to recover taxes on personal property paid under protest. The property in controversy consisted in part of wood veneers and lumber

imported from outside the United States, and the validity of the tax on such veneers and lumber was challenged on the ground that it was an "impost or duty on imports" and therefore prohibited by Art. I, Sec. 10, Clause 2 of the Constitution of the United States. The trial court sustained the validity of the tax and denied recovery thereof. Plaintiff appeals.

The trial court made comprehensive findings of fact, the adequacy and correctness of which are not challenged. For present purposes, the facts may be summarized as follows: Plaintiff carries on a manufacturing business in the city of Algoma. In the manufacture of its products it uses both foreign and domestic wood veneers, and both foreign and domestic lumber. It imports the foreign veneers from vari- [fol. 68] ous nations, and they are received at its plant in Algoma in bundles secured by metal straps, or in wooden crates, such straps or crates being the original packages in which they are shipped. The veneers are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of veneered products.

The foreign lumber is imported by plaintiff from Canada in rough unplaned form, in railroad cars, the individual pieces not being bundled or fastened together in any way. Most of this lumber is "green", and must be dried before being converted into manufactured products. When received it is piled in plaintiff's storage yard in such a manner as to facilitate air-drying, and for the dominant purpose of air-drying it. Air-drying does not remove enough of the moisture, and the lumber must also be kiln-dried. While the drying might be done entirely in the kiln, it is more economical, and is good business, to air-dry it before it is run through the kiln.

On the assessment date, May 1, 1955, foreign veneers and foreign lumber thus stored in plaintiff's warehouse and storage yard had a value of $288,593. The assessor determined, and the trial court found, that one-half of the imported veneers and lumber, of the value of $144,296 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. The court held, in an opinion carefully analyzing the authorities, that the constitutional provision invoked by the plaintiff

did not immunize the imported materials thus required for current operational needs, from the city's general property tax.

[fol. 69] Wingert, J. The question for decision is whether clause 2, of sec. 10 of Art. I of the Constitution of the United States prohibits the imposition of the city's general property tax on the veneer and lumber imported by the plaintiff from other nations, which are still in the original package or form in which imported, but which are held and needed for the manufacturer's current operational needs.

The constitutional provision is as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and controul of the Congress. * * * "

The purpose of the provision so far as it relates to imports appears to have been to prevent discrimination against imports by means of taxation, and to prevent the seaport states through whose harbors most imports then came, from taxing the imports of the other states, and thus burdening the commerce of the latter and continuing the commercial warfare between the states which it was one of the main objectives of the framers of the Constitution to suppress. See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.) 479; *Brown* v. *Maryland*, 12 Wheat. 419, 440.

1. *Established interpretations.* As an original proposition, it might well be doubted that a general property tax not discriminating against imported goods is "an impost or duty on imports". The Supreme Court of the United States has held that such a tax is within the purview of the constitutional provision, however, and of course we are bound thereby. *Low* v. *Austin*, 13 Wall. 29, 34.[1]

[1] A distinguished scholar in this field, the late Prof. Thomas Reed Powell, commenting on the opinions in *Hooven & Allison Co.*

[fol. 70] The leading case on the interpretation of the constitutional provision is *Brown* v. *Maryland,* 12 Wheat. 419, in which a state statute requiring importers of foreign goods by bale or package to take out a license and pay a fee of $50 before selling the goods, was held to impose an unconstitutional impost on imports. The extensive opinion by Chief Justice Marshall is one of that jurist's landmark opinions and characteristically went beyond the necessities of the particular case. While the Maryland statute was plainly discriminatory against imports and might have been disposed of on that ground, the Chief Justice went further and declared in substance that a tax on an imported article in the hands of the importer may be a duty or impost on the import. Referring to the above stated purpose of the constitutional provision, the Chief Justice said:

> " * * * it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer *the instant it was landed,* as by a power to tax it while entering the port. * * * A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing states * * * ". (p. 439-440)

Conceding that the immunity cannot follow the import indefinitely, and must end somewhere, the Chief Justice proceeded:

> "But, while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a po of time when the prohibition ceases, and the powe the State to tax commences; we cannot admit that this point of time is *the instant that the articles enter the country.* It is, we think, obvious, that this construction would defeat the prohibition." (p. 441)

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v. *Evatt,* 324 U.S. 652, says "We could welcome fresh consideration whether property taxes should be regarded as 'imposts' or 'duties' ". 58 Harvard Law Review 858, 874.

The Chief Justice recognized that it would be futile to try to stake out in advance the line where immunity ceases and the states' power to tax attaches.

> [fol. 71] "The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. * * * Yet the distinction exists, and *must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.*" (p. 441)

Nevertheless, and we must assume tentatively in view of the language just quoted,[2] he suggested the following principle:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (pp. 441-442)

Chief Justice Marshall said much more in the course of his lengthy opinion, by way of argument, illustration and dictum, and on another branch of the case held that the Maryland statute was also invalid under the commerce clause of the constitution (Art. I, sec. 8). It is no disparagement of the great Chief Justice to point out that some of his

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[2] "But he (Marshall) had too much of an instinct for the practical to attempt rigidities which could not possibly bind the future * * * and so his views were often tentative and suggestive; they conveyed cross-currents of doctrine and purposed ambiguity." Frankfurter, The Commerce Clause, 44-45.

dicta have not been followed by the court in later cases,[3] as for example, that to the effect that the principles laid down in *Brown* v. *Maryland, supra,* would apply equally to importations from a sister state. (12 Wheat. at 449) It has [fol. 72] later been held consistently that goods brought from another state are not imports within the meaning of Art. I, sec. 10 of the United States Constitution. *Woodruff* v. *Parham,* 8 Wall. 123, 136, *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520. Likewise his original package doctrine has been repudiated as a criterion of immunity of interstate shipments under the commerce clause, from state taxation. *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506.

While *Brown* v. *Maryland* dealt with a statute prohibiting sale of imported goods by the importer without payment of a license fee, it has been accepted as authority for the broader proposition that the imported goods themselves cannot be taxed while held in the importer's warehouse in the original package, for resale. *Low* v. *Austin,* 13 Wall. 29, 34, *May* v. *New Orleans,* 178 U. S. 496, 507. Immunity does not depend upon a showing that the tax is in fact discriminatory against imports. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 76. After the merchandise has once been sold by the importer, however, it is taxable as other property, even though remaining in the original package. *Waring* v. *Mayor,* 8 Wall. 110, 122.[4] If the goods are taken out of the original outer package, even before sale, their immunity as "imports" ceases though they are still in smaller original packages. *May* v. *New Orleans,* 178 U. S. 496, 508-509.

Brown v. *Maryland, supra,* and most of the earlier cases dealt with attempts to tax, directly or indirectly, goods held for resale. The leading case on state taxation of imports held by the importer for use in manufacture is *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652, 688.

[3] "• • • the rule announced in *Brown* v. *Maryland* has at times been severely criticized • • • and has in some cases been narrowly restricted in its application • • •." Black, J., dissenting in *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652, 688.

[4] A pledge of the goods by the importer has been held to terminate their immunity. *Southern Pac. Co.* v. *Calexico,* 288 Fed. 634, 641.

Allison Co. v. *Evatt*, 324 U. S. 652, decided in 1945. In that [fol. 73] case it was held that bales of hemp brought from the Phillipine (sic) Islands and stored in a manufacturer's warehouse in Ohio preliminary to use in the manufacture of cordage were imports in the hands of the importer within the meaning of Art. I, sec. 10, United States Constitution, and under *Brown* v. *Maryland, supra*, were immune from state ad valorem taxes. (pp. 664-668). Four justices dissented from that feature of the decision now pertinent, in an opinion by Mr. Justice Black, 324 U. S. at 686.

In *Hooven & Allison Co.* v. *Evatt, supra*, the court recognized that the constitutional immunity from state taxation is lost when imported goods are put to the use for which they were imported, or when the original packages in which they were imported are broken. (324 U. S. 652, at 665, 666). However, the majority was unwilling to terminate the constitutional immunity when the goods reached the factory warehouse in the original package.

> "But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation." (p. 666)

On the contrary, the majority affirmed the dictum of Chief Justice Taney in *License Cases*, 5 How. 504, 575.

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (324 U. S. at 666).

Nevertheless the majority cautiously limited the decision to the case before it, holding that "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original package." (p. 667); and expressly saved the question which is before us today.

[fol. 74] "And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667.

Even this carefully limited decision commanded the support of only five of the justices. The other four dissented in an opinion by Mr. Justice Black, who considered that every conceivable relationship the bales of hemp had once borne to the process of importation had ended, and that therefore they were no longer immune as imports; and also pointed out that to accord them constitutional immunity from property taxes would effect a discrimination in favor of foreign as against domestic products. 324 U. S. at 686-691.

To sum up the state of the law to date, it appears that imported goods are immune from even non-discriminatory taxes on general property until sold by the importer, or removed from the original packages in which imported, or put to the use for which acquired, as where placed in process of manufacture. The Supreme Court has held, by the narrowest of margins, that the mere warehousing of the goods preliminary to manufacture does not of itself terminate the immunity. The application of the tax to raw materials stored at the importer's factory, which, though still in the original package, are essential to current manufacturing requirements has been expressly left undecided.

2. *The imported lumber.* The lumber in issue was imported from Canada in carloads of individual pieces not bundled or fastened together, and was unloaded and piled [fol. 75] in plaintiff's storage yard to facilitate air-drying. We have little difficulty in holding that it had ceased to be immune from the city's general property tax on the assessment date.

The lumber is not protected from taxation by the original package doctrine, for it was unpackaged, unless the freight car be considered a package, in which case it was removed from the original package when unloaded. The individual sticks of lumber themselves are certainly not packaged or packages in any reasonable sense of the term. *E. J. Stanton & Sons* v. *County of Los Angeles,* 78 Cal. App., (2d) 181, 188, 177 P. (2d) 804, 808. Cert. den. 332 U. S. 766.

Moreover, these pieces of lumber had "entered the process of manufacture", and thus had been "put to the use for which they were imported" (*Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 657, 666) when they were stacked for air-drying, since the drying of the lumber was essential to manufacture, and therefore a first step in the manufacturing process. It was not necessary that the lumber be sawed up in order to place it in process of manufacture. The imported article consisted of a combination of wood and diffused water. Drying separates the wood from the water; sawing separates wood from wood. If the lumber had not been air-dried, it would have had to be kiln-dried for a longer time. Obviously it would be in process of manufacture when drying in an artificially-fired kiln. Removal of water is no less a manufacturing operation when performed out of doors by solar heat.

Insofar therefore as the judgment holds the lumber taxable, it must be affirmed.

[fol. 76] 3. *The imported veneers.* These present a much closer question. They were still in the original packages in which they were imported, consisting of metal straps around bundles of pieces in most cases, and of wooden crates in others. We assume for present purposes that straps holding bundles of pieces are a package. The veneers had not been subjected to any process to alter their form or chemical

composition, but had merely been stored in plaintiff's warehouse to await processing.

If no other facts appeared, and on the assumption that straps around a bundle make a package, we would be constrained to hold the veneers immune from the city's tax on the authority of *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, discussed above, notwithstanding the dissent of the maximum minority from that decision and our own philosophical doubts about its correctness. But there are other facts in the present case which in our opinion are sufficient to distinguish it from that one.

In the instant case it was found as a fact by the trial court, and the finding is not challenged by appellant, that the veneers which were actually taxed were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. In making that finding, the trial court recognized the practical fact of industrial life, that if a manufacturer is to maintain the continuity of operation that is essential to efficiency and ability to meet competition and thus stay in business, he must at all times maintain on hand at his plant and ready for immediate use, a certain minimum stockpile of raw materials; and from that fact he stated the following conclusion:

> [fol. 77] "If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax."

The trial court's finding brings the present case squarely within the category which was expressly left undecided in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667, quoted page 8 above, and which we may therefore decide on its merits.

We think the trial court was right in holding that the minimum stockpile of veneers which the manufacturer had to have on hand to meet current requirements was in substance being put to the use for which the raw materials were imported, even though not yet removed from their wrappings or subjected to any physical or chemical change. As to such goods, a rule which would make taxability depend upon the cutting of some metal bands or removal of a wrapping, would be too artificial and mechanical to commend itself. We think it would be equally mechanical, and disregardful of realities, to hold that the manufacturer must inaugurate some process of physical or chemical change before the goods can be considered as put to the use for which they were imported or can be regarded as a part of the mass of property which may be taxed for the support of state government. Foreign commerce, like commerce among the several states, "is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, [fol. 78] 398. As a practical matter, the minimum current operational requirements of materials which the manufacturer had assembled in his plant for purposes of immediate availability for change in form were in use in and devoted to the manufacturing enterprise, as much as if they were being dried, heated, reshaped, chemically treated, or otherwise changed in form or composition. The purpose for which the veneers were imported was to meet the requirements of a going manufacturing concern; and one of such requirements was the presence of a stockpile equal to minimum current manufacturing requirements. As a practical matter, a manufacturing enterprise cannot be carried on successfully without having current operational requirements of raw materials on hand, especially where it takes a considerable time to get more of the materials after ordering them, any more than it can be car-

ried on without changing their form or composition.[5] The decision under review merely recognizes and gives significance to that fact of industrial life.

We appreciate that there are expressions in the decisions of the U. S. Supreme Court which may be cited against the conclusion we have reached; but they must be read in connection with the facts of those cases. No case has been brought to our attention, nor have we found any, in which the facts on which the trial court based its decision in the present case were found to exist and were brought to the attention of the Supreme Court. In the one case where the argument was made, it was rejected and decision was specifically reserved on the point, because the record did not afford a basis for saying that any part of the imported material was required to meet immediate operational needs. *Hooven & YAllison* (sic) *Co.* v. *Evatt*, 324 U. S. 652, 664, 667.

[fol. 79] We think it accords with sound policy, and does no violence to either the purpose or the words of the constitutional provision, to hold that the city may tax the imported veneers in question. We are satisfied that the rule we are adopting preserves the immunity of imports long enough to serve all purposes for which the provision was adopted. The tax is not discriminatory, for it applies alike to all comparable property in the city, regardless of origin. The city has furnished a quid pro quo, by extending its police and fire protection to the veneers and lumber as to other property. The tax cannot prejudice foreign commerce, nor afford a means by which seaport or border states can burden the others or wage commercial warfare against them by taxing their imports, fear of which activity was the motive for adopting the constitutional provision.[6]

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[5] Respondent's brief puts the proposition picturesquely as follows: "If, when dawn broke over Algoma on the first day of May, 1955, appellant had everything on hand except the imported raw materials necessary to meet current manufacturing requirements, it is reasonable to assume that appellant would have been out of the manufacturing business, at least temporarily."

[6] After a penetrating commentary on the majority and minority opinions in *Hooven & Allison Co.* v. *Evatt*, *supra*, the late Prof.

On the other hand, to hold that the immunity of imported goods extends to the point claimed by appellant, would work an affirmative discrimination against domestic materials and against manufacturers using domestic materials, and would enable the importing manufacturers to obtain police, fire and other local protection and benefits without paying for them. While such discrimination also results from some applications of the constitutional provision in question by which we are bound, it is nevertheless proper to consider it as a relevant factor in determining whether the immunity should be extended beyond the absolute compulsion of the decisions of the court of last resort.

[fol. 80] It is argued that the original package rule is easy to administer, while it may be difficult to determine when imports have ceased to be imports as a result of becoming part of the stockpile required for current operational needs. We think, however, that the reasons both of constitutional law and policy against further extension of the immunity from state and local taxation outweigh mere problems of administration. Current operational requirements are a fact, not a fancy; and like value, they can be determined by the assessing authority, albeit sometimes with difficulty. The original package rule itself may present substantial administrative difficulties. See Mr. Justice Black's dissent in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 691; and *E. J. Stanton & Sons* v. *County of Los Angeles*, 78 Cal. App. 2d 181, 186, 177 P. 2d 804, 807. In taxation, absolute certainty cannot be had or expected, as the numerous cases on valuation pointedly illustrate.

By the Court.—Judgment affirmed.

[fol. 81] Brown, *J.* (Dissenting in part, concurring in part.) As an original construction of Art. I, Sec. 10, Cl. 2,

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Thomas Reed Powell said: "The immunity must survive to the extent that neither the goods nor dealings in them are, under any circumstances of time or place or condition, taxed or taxable because of their origin. To say that it must prevail against inclusion in general assessments after arrival or else be destroyed is to take an animistic view of the goods themselves as sacred objects and to forget the commercial aspects of foreign trade and domestic absorption." 58 Harvard Law Review, 858, 875.

U. S. Constitution, I would have little difficulty in agreeing with the dissenters in *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 688, 142 Ohio St. 235, that when imported goods or raw materials have reached the place where the importer intends to put them to the use for which they were imported and he stores them until he needs them, a non-discriminatory *ad valorem* tax upon them does not offend the Constitution even though the goods or materials in such storage remain in their original package. The difficulty would be even less in agreeing with the majority of this court that part of the goods are taxable.

But I must recognize that this is not an original proposition and the dissenters' view in *Hooven & Allison* v. *Evatt, supra,* is that of a minority. The majority in that case reiterated the law as it has been established by an un-[fol. 82] broken line of decisions beginning with *Brown* v. *Maryland* (1827), 12 Wheat. 419, that the constitution protects imported items against local taxation while they are in their original packages and have not been disposed of or used by the importer. For examples see *Low* v. *Austin* (1871), 80 U. S. 29; *Anglo-Chilean Corp.* v. *Alabama* (1933), 288 U. S. 218, 225 Ala. 141, as well as *Hooven & Allison Co.* v. *Evatt, supra.*

In the latter case, the majority said, p. 666:

> ". . . no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. . . ."

And, further, p. 667:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. . . ."

The law, as I read it, is well settled by the decisions of the supreme court of the United States that until put to use or sold or otherwise disposed of by the importer materials in their original packages are not subject to a state tax. The veneers now in question satisfy all these conditions

of immunity; and, like the fibers in *Hoover* (sic) *& Allison*, have not been subjected to manufacture. It is our proper province to apply that oft-stated law. It is not our province to modify it or to declare exceptions to it.

The argument, unsupported by the record, was made by the tax collector in *Hooven & Allison Co.* v. *Evatt, supra*, that some of the materials were so essential to current manufacturing requirements that they might be deemed to have entered the manufacturing process and so were taxable, as already put to use although still in their original packages. In reply to this the court said (p. 667) there was no necessity and no occasion to consider that question. I cannot agree with the majority of our court [fol. 83] that the form of the rejection of the argument changed the established law. The decision, in fact, *refused* to change it. Therefore I consider that this court is still bound to apply the law as it has been so often declared and as it remained when the court got through with *Hooven & Allison Co.* v. *Evatt, supra.* We, as a state court, have not been invited nor are we authorized to create an exception to the principle so often stated by the United States supreme court, that in the original package, unsold and unused imported materials are tax exempt. It is not for us to say that their immunity is lost when the day of use draws near. The United States supreme court was asked to make that change in the law. It would not. We should not.

Therefore, I think we must reverse, as to the veneers.

Respecting the lumber, the learned trial court found that the method of piling it had the dominant purpose of readying it for use. That finding makes it possible, I think, to agree that the manufacturing process had begun when the pile was constructed. Therefore I am able to concur in the decision that the lumber lost its status as an import and is taxable, though the ground that half of it is taxable because of current manufacturing needs is untenable.

I am authorized to say that Mr. Justice Currie and Mr. Justice Steinle concur in what is said here.

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] SUPREME COURT OF THE UNITED STATES
No. 885—October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—May 19, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 588 and No. 589.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.